

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
BENNY FITZWATER,	:	CIVIL ACTION
CLARENCE BRIGHT, TERRY PRATER,	:	NO. 2:16-cv-09849
EMMET CASEY, JR.,	:	
CONNIE Z. GILBERT,	:	Consolidated with:
ALLAN H. JACK, SR., and,	:	CIVIL ACTION
ROBERT H. LONG.,	:	NO. 1:17-cv-03861
Plaintiffs,	:	
	:	
-vs-	:	
	:	
CONSOL ENERGY, INC.,	:	
CONSOLIDATION COAL CO.,	:	
FOLA COAL CO., LLC,	:	
CONSOL OF KENTUCKY, INC.,	:	
CONSOL PENNSYLVANIA COAL CO.,	:	
LLC, and KURT SALVATORI,	:	
	:	<b>BENCH TRIAL</b>
Defendants.	:	<b>VOLUME VI</b>
	x	

**TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.,  
SENIOR UNITED STATES DISTRICT JUDGE  
FEBRUARY 17, 2021**

**APPEARANCES:**

**FOR THE PLAINTIFFS:**

**SAMUEL B. PETSONK, ESQUIRE**  
PETSONK PLLC  
P. O. Box 1045  
Beckley, WV 25802

Proceedings recorded by mechanical stenography,  
transcript produced by computer.

\_\_\_\_\_  
CATHERINE SCHUTTE-STANT, RDR, CRR  
Federal Official Court Reporter  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

**APPEARANCES CONTINUED:**

**FOR THE PLAINTIFFS:**

**BREN J. POMPONIO, ESQUIRE**  
**LAURA DAVIDSON, ESQUIRE**  
Mountain State Justice, Inc.  
1217 Quarrier Street  
Charleston, WV 25301

**FOR THE DEFENDANTS:**

**JOSEPH J. TORRES, ESQUIRE**  
**ALEXIS E. BATES, ESQUIRE**  
**EMMA J. O'CONNOR, ESQUIRE**  
**KATHERINE M. FUNDERBURG, ESQUIRE**  
Jenner & Block LLP  
353 N. Clark Street  
Chicago, IL 60654

**FOR THE DEFENDANTS:**

**MICHAEL D. MULLINS, ESQUIRE**  
Steptoe & Johnson PLLC  
707 Virginia Street East  
17th Floor  
Charleston, WV 25301

## INDEX

DEFENDANT'S  
WITNESSESDIRECTCROSSREDIRECTRECROSSEXAMINATION

JAMES WATERS

1070

1080

^

^

^

GENE BAILEY

1086

1095

^

^

^

GERALD NICHOLSON 1102

1114

^

^

^

JOHN FOX

1122

1143

1158

^

^

VOIR DIRE 1153, 1160

VIDEOTAPED DEPOSITIONS:

TOM HUDSON

1168

CHASE ELSWICK

1169

CRAIG CAMPBELL

1171

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX TO EXHIBITS

<u>PLAINTIFF'S</u> <u>EXHIBITS</u>		<u>ADMITTED</u>
(None)		
<u>DEFENDANT'S</u> <u>EXHIBITS</u>		<u>ADMITTED</u>
32		1131
33-A & 33-B		1170
34-A & 34-B		1170
35-A & 35-B		1172

FITZWATER v CONSOL

1 (The following Bench Trial was held before the  
2 Honorable John T. Copenhaver, Jr., Senior United States  
3 District Judge, in the case of *Fitzwater, et. al. versus*  
4 *CONSOL, et. al*, on Wednesday, February 17, 2021, at  
5 Charleston, West Virginia.)

6 P-R-O-C-E-E-D-I-N-G-S

9:54 a.m.

7 THE CLERK: All rise.

8 THE COURT: Good morning. Please be seated.

9 Let me ask you first, what has created the delay  
10 this morning?

11 MR. POMPONIO: Your Honor, there was an  
12 evidentiary deposition scheduled this morning and that is  
13 what delayed us.

14 THE COURT: Well, it shouldn't have been scheduled  
15 to interfere with the trial of this matter. And we've lost  
16 30 minutes waiting for Mr. Petsonk, I take it, who is still  
17 not here?

18 MR. POMPONIO: That's right, Your Honor. That is  
19 where he is. He said he was on his way, but I don't have a  
20 time frame, but we are prepared to proceed.

21 THE COURT: Let's not let this happen again. It  
22 is just such an unnecessary waste. I've got to get through  
23 matters to get to other matters, and this is interfering  
24 with that needlessly. Thank you.

25 And I understood that Mr. Torres indicated that he had

WATERS - DIRECT

1 a motion to make. Is he here to make it?

2 MR. MULLINS: Your Honor, Mr. Torres is out in the  
3 hallway, but we are going to defer on the motion and proceed  
4 with evidence.

5 THE COURT: And you may proceed.

6 MS. O'CONNOR: Defendants call Jim Waters.

7 THE CLERK: If you would please take the lectern.

8 **JAMES WATERS, DEFENDANT'S WITNESS, SWORN**

9 THE CLERK: Please state your name and spell it  
10 for the record.

11 THE WITNESS: James Waters, J-A-M-E-S, Waters,  
12 W-A-T-E-R-S.

13 THE CLERK: Thank you, Mr. Waters, if you'd please  
14 take the stand.

15 **DIRECT EXAMINATION**

16 BY MS. O'CONNOR:

17 **Q.** Good morning, Mr. Waters.

18 **A.** Good morning.

19 **Q.** Thank you for being here today. Where do you currently  
20 live?

21 **A.** I live in Grafton, West Virginia.

22 **Q.** Are you a party to this lawsuit?

23 **A.** No.

24 **Q.** So how did you learn about this trial?

25 **A.** Some of your colleagues contacted me several years ago

WATERS - DIRECT

1 to discuss it.

2 Q. And did you receive a subpoena to be here?

3 A. I did, yes.

4 Q. Thank you. Did you previously work at CONSOL Energy?

5 A. Yes, I did.

6 Q. And when did you start working at CONSOL?

7 A. First started with them in December of 1990.

8 Q. And when did you stop working for CONSOL?

9 A. I left CONSOL in 1999, initially. And then I had  
10 another time I worked with the company two different periods  
11 of time. The other time was like from probably '98 to 2000  
12 or so.

13 Q. Okay. And then if you combine those two times at  
14 CONSOL, approximately how many years did you work in Human  
15 Resources at CONSOL?

16 A. 10, approximately, mm-hmm.

17 Q. And during your time with CONSOL, did you ever work at  
18 the Buchanan Mine?

19 A. Yes, I did.

20 Q. Do you remember what period you were there?

21 A. I believe it was from, like, 1992 to 1995.

22 Q. Okay. And what was your job title when you were at  
23 Buchanan?

24 A. I was a personnel assistant.

25 Q. As a personnel assistant at Buchanan, what were your

WATERS - DIRECT

1 job duties?

2 **A.** I did a lot of work with the employees, just helping  
3 them with benefits. I did some training, kind of did all of  
4 the day-to-day administration of things at the mine for  
5 folks.

6 **Q.** Okay. So after you became employed by CONSOL and when  
7 you were at Buchanan, did you become familiar with CONSOL  
8 retiree medical benefits?

9 **A.** I did. Yes. After I left Buchanan, I was the  
10 coordinator of health benefits for the company about three  
11 years up in Pittsburgh.

12 **Q.** So how did you learn about exactly what retiree medical  
13 benefits CONSOL was offering?

14 **A.** We did training with employees, new employee  
15 orientations. Those were like a five-day training program.  
16 And part of that five days was going over the benefits, and  
17 we also, on occasion, had the spouses come in. Those  
18 usually were conducted on a Saturday, and we would have the  
19 spouses of the employees come in, and we would discuss the  
20 benefits with them as well. So I was trained in advance to  
21 providing that training.

22 **Q.** So when you were trained in advance, did you read  
23 through the benefit plan documents you saw?

24 **A.** Yes. There was a lot of reading and understanding.  
25 People who had been around longer than me also provided



WATERS - DIRECT

1 guidance and counsel.

2 **Q.** Do you remember what the benefit plan stated regarding  
3 how long benefits would be provided?

4 **A.** I do. All of the benefit plans had disclaimers in  
5 them, so to speak, in that the company reserved the right to  
6 amend, change, suspend, terminate any of the benefit plans  
7 at any time at their sole discretion.

8 **Q.** Okay. So did CONSOL's written benefit materials say  
9 that retiree medical benefits would be provided for life?

10 **A.** No.

11 **Q.** Did CONSOL's written benefit materials say that retiree  
12 medical benefits were vested?

13 **A.** No. The only time that I was familiar with the vesting  
14 principle was with the 401(k) program. It was a five-year  
15 cliff vest at that point in time. And then, you know,  
16 retirement or pension benefits was also a five-year vest.  
17 But there wasn't any such language when it came to other  
18 qualified benefits.

19 **Q.** Okay, that makes sense. And you mentioned doing  
20 orientation sessions. So did you conduct employee  
21 orientations at Buchanan?

22 **A.** I did, yes.

23 **Q.** Do you know approximately how many orientations you  
24 conducted during your time at Buchanan?

25 **A.** Wow, that was -- you know, we are going back 25, 30

WATERS - DIRECT

1 years. I would say something on the order of 10 is my best  
2 recollection.

3 **Q.** Did you use a script when you were giving those  
4 orientation presentations?

5 **A.** We didn't have a script, per se, but we did have a  
6 slide deck before the days of PowerPoint. We actually had  
7 slides that we would share with the employees and we would  
8 go over the content of those slides.

9 **Q.** And the sessions of the orientations that you  
10 personally conducted, what topics did you cover?

11 **A.** I conducted, you know, the company's philosophy on  
12 maintaining union-free status. I did the benefits programs.  
13 I did some first aid and CPR trainings, as well, things of  
14 that nature.

15 THE COURT: Let me ask if we can get some times  
16 when you were doing this. You were at Buchanan from '92 to  
17 '95, did you say?

18 THE WITNESS: Yes, sir.

19 THE COURT: Then you were there again from '98 to  
20 2000?

21 THE WITNESS: No, sir. I was at a different coal  
22 mine at that point.

23 THE COURT: Where was that?

24 THE WITNESS: That was with Robinson Run Coal Mine  
25 in Harrison County.

WATERS - DIRECT

1 THE COURT: It was owned by whom?

2 THE WITNESS: That was a CONSOL mine, as well,  
3 sir.

4 THE COURT: And you say you were coordinator for  
5 the company for benefits; what period of time was that?

6 THE WITNESS: That would have been from  
7 approximately 1995 to '98, sir.

8 THE COURT: And is that when you were associated  
9 with HR?

10 THE WITNESS: Yes. I was in HR the majority of  
11 the time I was with CONSOL.

12 THE COURT: Well, you were there from '95 to '98?

13 THE WITNESS: In the corporate office, I was  
14 there.

15 THE COURT: I'm trying to figure out where you  
16 were, when. When were you in Human Resources?

17 THE WITNESS: Well, when I started at CONSOL in  
18 December of '90, I worked in a warehouse. And that was  
19 until February of 1991. And just three months, and then  
20 they promoted me into Human Resources personnel assistant at  
21 those mines in northern West Virginia.

22 And then I ultimately was transferred to the Buchanan  
23 Mine in Virginia in about 1993 or so. Stayed there --

24 THE COURT: And were you there from '93 to '95?

25 THE WITNESS: Yes, sir.

WATERS - DIRECT

1 THE COURT: In what capacity?

2 THE WITNESS: Personnel assistant, Human  
3 Resources.

4 THE COURT: Thank you. Please go ahead.

5 THE WITNESS: Yes, sir.

6 MS. O'CONNOR: Thank you.

7 BY MS. O'CONNOR:

8 **Q.** When you were covering benefits at the orientations at  
9 Buchanan, did you ever tell employees that CONSOL retiree  
10 medical benefits would be provided for life?

11 **A.** No. I mean, the rules at the time were, you know, if  
12 someone did retire, then, you know, they would have those  
13 retiree benefits for the balance of their life, subject to  
14 change. But those were the rules that were in place at the  
15 time. But never promised anybody that they would have  
16 benefits for the rest of their life.

17 **Q.** Okay. And during those orientations at Buchanan, did  
18 you ever tell employees that CONSOL retiree medical benefits  
19 were vested?

20 **A.** No. I don't ever recall saying that.

21 **Q.** And you mentioned the disclaimer. So did you ever tell  
22 any employees at the orientation that CONSOL retiree medical  
23 benefits would never change?

24 **A.** No. In fact, we told them the opposite; that, you  
25 know, all of the plans, including retiree medical, were

WATERS - DIRECT

1 subject to change. It was actually on one of the slides,  
2 the language regarding the company's ability to change,  
3 manage, modify, or suspend any of the benefits.

4 **Q.** So the language on the slides, where did you get that  
5 language from? Which document, if any?

6 **A.** It would have been out of one of the plan documents or  
7 the employee handbook or somewhere like that. I know that  
8 language was one of the very first paragraphs in the  
9 employee handbook at the time.

10 **Q.** So in these presentations, you never -- or did you ever  
11 say that CONSOL retiree medical benefits would never be  
12 terminated?

13 **A.** No.

14 **Q.** And when you were conducting orientations, did you ever  
15 tell employees that that reservation of rights language in  
16 the benefit plan would not apply to retiree medical  
17 benefits?

18 **A.** No.

19 **Q.** What, if any, written materials would you have  
20 distributed during these orientations?

21 **A.** So we would give a copy of the employee handbook to the  
22 employees. And then we also had a three-ring binder that  
23 contained all of the Summary Plan Descriptions for all the  
24 benefit plans that they were eligible for.

25 **Q.** Okay. And then other than the employee orientation,

WATERS - DIRECT

1 did you conduct any other presentation at Buchanan that  
2 would have covered retiree benefits?

3 **A.** The spousal sessions we talked about. But that -- and  
4 we may have had -- we may have had refreshers on those  
5 throughout the years. I can't be certain of that. But I  
6 seem to recall -- refresher training occasionally there once  
7 every few years.

8 **Q.** And were the refresher trainings when you talked about  
9 retiree medical benefits, would that basically cover the  
10 same things that you talked about in orientation?

11 **A.** Yes, ma'am.

12 **Q.** Are you familiar with an individual named Emmett Casey?

13 **A.** I remember Emmett, yes, ma'am.

14 **Q.** How do you know Mr. Casey?

15 **A.** He was an employee at the Buchanan Mine during the  
16 period of time I was there, and I recall him.

17 **Q.** Did you ever conduct an orientation for when Mr. Casey  
18 was present?

19 **A.** Not that I recall. Mr. Casey was employed there prior  
20 to me coming there, so I would not have been involved in his  
21 new employee orientation for sure. He was already employed  
22 there when I came to the mine.

23 **Q.** Okay. Did you ever give any other kinds of benefit  
24 presentation where Mr. Casey was present that you remember?

25 **A.** Maybe one of the refresher trainings or something of

WATERS - DIRECT

1 that nature.

2 **Q.** Okay. Did you ever meet one-on-one with Mr. Casey to  
3 discuss his retiree medical benefits?

4 **A.** Not that I can recall.

5 **Q.** Did you ever promise Mr. Casey lifetime retiree medical  
6 benefits?

7 **A.** No, ma'am.

8 **Q.** Did you ever tell Mr. Casey that CONSOL's retiree  
9 medical benefits were vested?

10 **A.** I do not recall ever telling him that.

11 **Q.** Did you ever tell Mr. Casey that the plan reservation  
12 of rights language found in the plan documents did not apply  
13 to him?

14 **A.** Absolutely not.

15 **Q.** Did anyone from CONSOL ever tell you that you had the  
16 authority to alter the terms of CONSOL's written plans?

17 **A.** No. Actually, to the contrary; we didn't have the  
18 authority to make any changes to the plans.

19 **Q.** So did you ever tell anyone that you had the authority  
20 to change the written plan?

21 **A.** No.

22 **Q.** Did anyone from CONSOL ever tell you to make any  
23 misrepresentations to employees regarding their retiree  
24 medical benefits?

25 **A.** No, ma'am.

WATERS - CROSS

1 Q. And did anyone from CONSOL tell you to lie to employees  
2 about their retiree medical benefits?

3 A. Absolutely not.

4 Q. Did anyone from CONSOL ever tell you to tell employees  
5 that their retiree medical benefits would be provided for  
6 life?

7 A. No.

8 Q. And did anyone from CONSOL ever tell you to tell  
9 employees that the reservation of rights language wouldn't  
10 apply to their retiree medical benefits?

11 A. No.

12 Q. Thank you. That's all the questions I have for now.

13 A. Thank you.

14 **CROSS-EXAMINATION**

15 **BY MR. POMPONIO:**

16 Q. Good morning.

17 A. Good morning.

18 Q. You testified you participated in approximately 10  
19 orientation meetings at the Buchanan Mine, correct?

20 A. Correct.

21 Q. And in those orientations in which you participated,  
22 did you orally discuss retiree welfare benefits with the  
23 miners?

24 A. Yes.

25 Q. Did you ever make comparisons to the UMWA plan in terms



WATERS - CROSS

1 of the retirement offered by CONSOL?

2 **A.** We made comparisons to all the different benefits that  
3 our employees had versus what the UMWA represented employees  
4 had, yes, sir.

5 **Q.** And you testified you used a slide presentation to  
6 guide your presentation of retiree welfare benefits --

7 **A.** Yes.

8 **Q.** -- in those orientations?

9 **A.** Yes, sir.

10 **Q.** Did those slide presentations have comparisons,  
11 comparing the CONSOL retiree benefits to the UMWA plan?

12 **A.** I don't know that they did specifically compare the  
13 retiree medical. I don't remember that, to be honest with  
14 you, sir.

15 **Q.** Where did you receive your direction to make  
16 comparisons to the -- between the CONSOL retiree welfare  
17 benefit plan and the UMWA plan?

18 **A.** It was part of the overall union-free strategy of the  
19 company, so, you know, everyone in HR was involved in those,  
20 in those discussions and presentations.

21 **Q.** Is it fair to say that you received that direction in  
22 part from the Vice President of Human Resources?

23 **A.** Not directly, but, I mean, yes -- he was the man in  
24 charge of those operations, yes, sir.

25 **Q.** Do you have any recollection, in the 10 orientations

WATERS - CROSS

1 that you participated in, personally, orally making any  
2 representations to the miners about the reservation of  
3 rights clause, that CONSOL could have reserved the right to  
4 terminate?

5 **A.** Yes, I do. There was a slide that actually had the  
6 language out of the handbook or the Summary Plan Description  
7 that we covered in those orientations.

8 **Q.** And so did you -- in addition to the slide  
9 presentation, did you -- do you recall saying out loud to  
10 the miners that CONSOL reserves the right to terminate the  
11 retirement welfare benefits?

12 **A.** Yes.

13 **Q.** What exact words did you use, if you can recall?

14 **A.** It was the language that was in the plan. I haven't  
15 seen that language for a number of years. Basically, you  
16 know, CONSOL reserved the right to change, suspend, revoke,  
17 terminate those plans at their sole discretion.

18 MR. POMPONIO: May I have a copy of Plaintiff's  
19 10-A?

20 Your Honor, may I approach?

21 THE COURT: Yes.

22 BY MR. POMPONIO:

23 **Q.** Mr. Waters, I'm handing you what's previously been  
24 marked Plaintiff's 10-A. And I'll represent to you that  
25 this is a document that was previously admitted into

WATERS - CROSS

1 evidence. It's a part of a larger document. These excerpts  
2 were the ones that were introduced into evidence. And I  
3 want to direct your attention to the first page.

4 It says, "Part of this is lawyer talk. And that is  
5 important. But let's look at a couple of key points.  
6 First, as it says -- company believes wholeheartedly in the  
7 things we have included in the handbook. But the company  
8 does reserve the right to change them."

9 MS. O'CONNOR: Objection; foundation.

10 Mr. Pomponio hasn't established that the witness knows  
11 what this is.

12 THE COURT: The witness may answer the question,  
13 whether he knows specifically what this is or not.

14 You may respond if you know the answer.

15 THE WITNESS: Can you repeat the question? I'm  
16 sorry.

17 BY MR. POMPONIO:

18 **Q.** Yes. I hadn't finished getting through that. I was  
19 going to ask you -- that language there that appears in the  
20 top of exhibit, Plaintiff's Exhibit 10-A, are you familiar  
21 with this language in terms of your discussions with miners  
22 at the 10 orientations in which you had participated in?

23 **A.** It seems familiar, yes.

24 MR. POMPONIO: Plaintiff's 15.

25 May I approach, Your Honor?

WATERS - CROSS

1 THE COURT: You may.

2 BY MR. POMPONIO:

3 Q. I'm handing you what's been marked as Plaintiff's  
4 Exhibit 15. I'll ask, could you please look at that  
5 document. And I'll represent to you that this is a -- it's  
6 a supervisor instruction relevant to the Bailey Mine, which  
7 I understand that you -- you didn't work at the Bailey Mine,  
8 but I wanted to know if you had received similar supervisory  
9 instructions to this for your orientations at the Buchanan  
10 Mine?

11 A. This document does not look familiar to me.

12 Q. Okay. Did you work with another HR manager at the  
13 Buchanan Mine by the name of Jeff Fox?

14 A. I never worked with Mr. Fox at Buchanan Mine. He was  
15 gone before I got there.

16 Q. I want to go back to something you mentioned in your  
17 direct testimony, and I don't have -- I didn't have it down  
18 exactly as you said it, but you said something along the  
19 lines that the rules in place provided that upon retirement  
20 that -- that the miners would receive medical benefits, I  
21 thought you said for life, subject to change.

22 Was that your testimony?

23 A. Yes, sir. At the time that I was there, should someone  
24 have retired during that time, then they would have had the  
25 retiree benefits for the balance of their life. That was

WATERS - CROSS

1 the -- that was the plan, as it was designed, at that time.  
2 It was later amended. And I think that's the big reason  
3 we're here today.

4 Q. Okay.

5 MR. POMPONIO: Your Honor, may I have a moment to  
6 confer?

7 THE COURT: Yes.

8 (An off-the-record discussion was held between  
9 plaintiffs' counsel.)

10 MR. POMPONIO: No further questions, Your Honor.

11 THE COURT: Thank you.

12 MS. O'CONNOR: Your Honor, may I have a moment to  
13 confer with counsel?

14 THE COURT: You may.

15 (An off-the-record discussion was held between defense  
16 counsel.)

17 MS. O'CONNOR: No further questions, Your Honor.

18 THE COURT: May the witness be excused?

19 MS. O'CONNOR: He may.

20 MR. POMPONIO: Yes, Your Honor.

21 THE COURT: Thank you, sir, Mr. Waters.

22 THE WITNESS: Thank you, Judge.

23 THE COURT: You're excused. Let me ask you -- and  
24 you can just leave the exhibit there at the bench, at the  
25 desk -- you're excused, but until the trial is over, don't

BAILEY - DIRECT

1 discuss your testimony with any other witnesses in the case,  
2 unless the Court gives you permission to do so.

3 THE WITNESS: Yes, sir.

4 THE COURT: Thank you.

5 THE WITNESS: Thank you.

6 MS. FUNDERBURG: Your Honor, the defendants call  
7 Gene Bailey.

8 **GENE FRANKLIN BAILEY, DEFENDANT'S WITNESS, SWORN**

9 THE CLERK: Mr. Bailey. Please state your name  
10 and spell it for the record.

11 Gene Franklin Bailey, G-E-N-E, F-R-A-N-K-L-I-N, Bailey,  
12 B-A-I-L-E-Y.

13 THE CLERK: Thank you, Mr. Bailey. If you would  
14 please take the stand.

15 **DIRECT EXAMINATION**

16 **BY MS. FUNDERBURG:**

17 **Q.** Morning, Mr. Bailey.

18 **A.** Good morning.

19 **Q.** Thank you for being here to testify today. Just to  
20 start off, can you tell us where you currently live?

21 **A.** I live in Bluefield, Virginia.

22 **Q.** And, Mr. Bailey, are you a party to this lawsuit?

23 **A.** Since I'm here, I assume that I am.

24 **Q.** Are you a defendant in this case?

25 **A.** I worked for Consolidation Coal, but, as far as, you

BAILEY - DIRECT

1 know, being a defendant, I don't know the answer to that.

2 Q. Okay. Well, let --

3 A. I have not seen the lawsuit.

4 Q. Okay. Can you tell me why you came here to testify  
5 today?

6 A. I received a subpoena from the law firm which indicated  
7 I had knowledge concerning this lawsuit. And I had received  
8 phone calls in the past indicating that.

9 Q. Mr. Bailey, can you tell me, did you ever receive  
10 retiree medical benefits from CONSOL?

11 A. Yes, I did.

12 Q. And how long did you receive those benefits?

13 A. I retired in 1997, and I received them until CONSOL  
14 changed the plan -- revoked the plan. I don't know the  
15 specific date.

16 Q. Okay. Let's talk a little bit about your history at  
17 CONSOL. So you previously worked at CONSOL, you said?

18 A. Yes, I did.

19 Q. When did you go start working at CONSOL?

20 A. I started March of 1976.

21 Q. And when is it that you retired?

22 A. The date I retired?

23 Q. Yes, sir.

24 A. Officially would have been July 1, 1998 -- '97. I  
25 stand corrected.

BAILEY - DIRECT

1       **Q.**    Can you just give us an overview of your career at  
2       CONSOL?

3       **A.**    Yes, ma'am.  I started, as I said, in March of 1976 as  
4       a personnel assistant in Virginia, which was the  
5       headquarters for the Southern Appalachian region of CONSOL.  
6       Three months later, I was promoted to manager of manpower  
7       services.  I continued to work in Pocahontas until we moved  
8       the regional office of Bluefield, Virginia, in 1983.

9               1985, I -- my title changed from manager of manpower  
10       services to manager of comp and benefits and salary  
11       administration.

12              In 1992, I was transferred to the Mid-Continent Region,  
13       west of St. Louis.  And there I worked -- also was a manager  
14       of manpower service and communications for that region.

15              I then was transferred to Morgantown, West Virginia, in  
16       January 1996, and also was in a human resource position  
17       there similar to the others.

18              And then I retired July 1 of 1997.

19       **Q.**    And just to clarify, can you tell us the locations  
20       where you worked?  I think you listed a couple of them  
21       there?

22       **A.**    Pocahontas, Virginia, and in an office there.  At the  
23       regional headquarters from '96 to -- I believe it was around  
24       1983, when we built the facility in Bluefield, Virginia,  
25       which again was the regional headquarters.  And then when I



BAILEY - DIRECT

1       went to St. Louis --

2               THE COURT: Let's go over that again.

3               THE WITNESS: I'm sorry.

4               THE COURT: You were at regional headquarters  
5 there from when to when?

6               THE WITNESS: The regional headquarters was moved  
7 from Pocahontas, Virginia, in 1983, to Bluefield, Virginia.  
8 We built a new office building.

9               THE COURT: Well, before that, where were you?

10              THE WITNESS: I was in Pocahontas, Virginia.

11              THE COURT: For how long?

12              THE WITNESS: From '76 to 1983.

13              THE COURT: Working for whom? CONSOL?

14              THE WITNESS: I'm sorry, sir?

15              THE COURT: Working for whom?

16              THE WITNESS: Working for Consolidation Coal.

17              THE COURT: Thank you.

18              THE WITNESS: I worked for Consolidation Coal all  
19 those years. When I went to the Mid-Continent Region, our  
20 headquarters was in a place -- and I probably can't even  
21 spell it for you -- but it was in Creve Coeur, which is a  
22 small city west of St. Louis.

23              And then I was transferred to Morgantown, West  
24 Virginia, and worked out of an office -- I think -- in a  
25 place called Osage, West Virginia, which was a former mine

BAILEY - DIRECT

1 site. The former headquarters had been in Morgantown, West  
2 Virginia.

3 BY MS. FUNDERBURG:

4 Q. Thank you, Mr. Bailey. And did you ever work at the  
5 Buchanan Mine?

6 A. No, I did not.

7 Q. Did you have any involvement at the Buchanan Mine?

8 A. I had some involvement from the regional headquarters  
9 in Bluefield, Virginia.

10 Q. What time period was that?

11 A. That probably would have been a few months prior to the  
12 opening of the Buchanan Mine, somewhere around 1983, '84.

13 Q. And what duties did you perform in relation to the  
14 Buchanan?

15 A. My primary duties were dealing with employee personnel  
16 within the region. When plans were made to commence with  
17 the hiring, I was involved in the preliminary hiring  
18 process, along with a vice president by the name of Ron  
19 Smith. We interviewed some of our former employees who had  
20 been laid off, both salaried and those represented by the  
21 UMWA. And that was my primary duty in regard to Buchanan at  
22 that time.

23 Q. Let's turn to while you worked at CONSOL. Can you tell  
24 me what, if any, involvement you had in putting together  
25 materials for employee -- new hire orientation programs?

BAILEY - DIRECT

1     **A.**    I really had no input in regard to the preparation of  
2     any orientations material.

3     **Q.**    And what, if any, involvement did you have in  
4     conducting the new hire orientation programs?

5     **A.**    I never -- I never conducted or participated in any new  
6     employee orientation programs.

7     **Q.**    Did you ever present at an orientation at the Buchanan  
8     Mine?

9     **A.**    No, ma'am.

10    **Q.**    Did you personally ever cover employee benefits in any  
11    orientation session?

12    **A.**    I never covered any in any orientation session.

13    **Q.**    And aside from any orientation, while you worked at  
14    CONSOL, were you involved in making any other presentations  
15    to employees?

16    **A.**    The only presentation that I made dealt with a program  
17    I refer to as sexual harassment or sexual discrimination. I  
18    was always involved if there were any kind of discrimination  
19    complaints or whether they be sex, race, and so forth. I  
20    did put a program together for sexual harassment and sexual  
21    discrimination, those presentations. And I don't ever  
22    recall putting on one at the Buchanan facility.

23    **Q.**    During what years did you conduct those presentations,  
24    if you recall?

25    **A.**    I would think it was in the late '80s, but I don't

BAILEY - DIRECT

1 totally recall it. And I may have put on a couple when I  
2 was in St. Louis, around '92, '93.

3 **Q.** And just to clarify, did any of those presentations  
4 cover employee benefits at all?

5 **A.** Not at all.

6 **Q.** Aside from those presentations that you testified to,  
7 did you make presentations at any other meetings while you  
8 worked at CONSOL?

9 **A.** None that I recall.

10 **Q.** Did you ever cover employee benefits with current  
11 employees at any other meetings?

12 **A.** No, ma'am.

13 **Q.** Mr. Bailey, I want to ask you about an individual named  
14 Emmett Casey. Do you know him?

15 **A.** I know him as an acquaintance. I do not know him well.

16 **Q.** Do you recall conducting any presentation where Mr.  
17 Casey was present while you worked at CONSOL?

18 **A.** I do not recall Mr. Casey ever being in any of my  
19 presentations.

20 **Q.** Whether or not you recall if Mr. Casey was present, did  
21 you ever make a presentation at Buchanan that addressed  
22 employee benefits?

23 **A.** No, ma'am.

24 **Q.** Did you ever tell Mr. Casey that he would have lifetime  
25 retiree medical benefits?

BAILEY - DIRECT

1       **A.**    No, ma'am.

2       **Q.**    Did you ever tell Mr. Casey that his retiree medical  
3       benefits would vest?

4       **A.**    No, ma'am.

5       **Q.**    Did you ever tell Mr. Casey that his benefits could  
6       never be terminated?

7       **A.**    No, ma'am.

8       **Q.**    Did you ever tell Mr. Casey to ignore language in his  
9       plan documents that stated CONSOL had the right to terminate  
10      or modify the benefits?

11      **A.**    No, ma'am.

12      **Q.**    Did you ever tell Mr. Casey that you had authority to  
13      promise him something different than what was written in  
14      CONSOL documents?

15      **A.**    No, ma'am.

16      **Q.**    More broadly, did you ever describe CONSOL's benefits,  
17      retiree benefits to any employee as vested?

18      **A.**    Restate that question, please.

19      **Q.**    Did you ever describe CONSOL's retiree medical benefits  
20      to any employee as being vested?

21      **A.**    Not that I recall.

22      **Q.**    Did you ever describe CONSOL's retiree medical benefits  
23      to any employee as being lifetime or lifelong?

24      **A.**    Never.

25      **Q.**    Did you ever tell any employee that CONSOL retiree

BAILEY - DIRECT

1 medical benefits would never change?

2 **A.** No, ma'am.

3 **Q.** Did you ever tell any employee that CONSOL retiree  
4 medical benefits would never be terminated?

5 **A.** No, ma'am.

6 **Q.** Did you ever lie to any employee about their benefits  
7 or the duration of those benefits?

8 **A.** No, ma'am.

9 **Q.** Did you ever tell any employee something about benefits  
10 that was different than what was written in CONSOL's plan  
11 documents and Summary Plan Descriptions?

12 **A.** No, ma'am.

13 **Q.** Did you ever tell any employee to ignore or disregard  
14 reservation of rights language in plan documents and Summary  
15 Plan Descriptions?

16 **A.** No, ma'am.

17 **Q.** Did you ever tell any employee that you had the  
18 authority to promise them something different than what was  
19 written in the plan documents?

20 **A.** No, ma'am.

21 **Q.** Okay. Just a couple final questions, Mr. Bailey.

22 Did anyone at CONSOL ever tell you that you had the  
23 authority to alter the terms of the written benefit plans?

24 **A.** No, ma'am.

25 **Q.** Did anyone at CONSOL ever tell you to lie to employees

BAILEY - CROSS

1 regarding retiree benefits?

2 **A.** No, ma'am.

3 **Q.** Did anyone at CONSOL ever tell you to mislead employees  
4 about retiree medical benefits?

5 **A.** No, ma'am.

6 **Q.** Did anyone at CONSOL ever tell you to promise employees  
7 that retiree medical benefits would vest or last for their  
8 lifetime?

9 **A.** No, ma'am.

10 **Q.** Did anyone from CONSOL tell you to tell employees that  
11 their benefits could never be terminated?

12 **A.** No, ma'am.

13 **Q.** And finally, did anyone ever tell -- at CONSOL ever  
14 tell you to tell employees to ignore or disregard  
15 reservation of rights language in plan documents?

16 **A.** No, ma'am.

17 **Q.** Thank you, Mr. Bailey. I have nothing further.

18 MR. PETSONK: Good morning, Your Honor.

19 THE COURT: Good morning.

20 **CROSS-EXAMINATION**

21 **BY MR. PETSONK:**

22 **Q.** Mr. Bailey, where are you employed right now?

23 **A.** I've been retired for almost 24 years.

24 **Q.** Have you performed any consulting or lobbying services  
25 during the time that you've been retired?

BAILEY - CROSS

1     **A.**    I've done no lobbying.  I've done a little bit of  
2     consulting with a company called King Tire.  I've done a  
3     little consulting and help set up the company here in  
4     Charleston by the name of BrickStreet, which now is Encova.

5     **Q.**    Any other --

6     **A.**    No, sir.

7     **Q.**    And is BrickStreet and Encova, is that a -- like a  
8     mutual insurance company?

9     **A.**    Yes, sir, it is.

10    **Q.**    Does it provide Workers' Compensation coverage to coal  
11    mining companies?

12    **A.**    Yes, sir.

13    **Q.**    Have you ever worked for or consulted for CONSOL Energy  
14    in connection with your work for BrickStreet?

15    **A.**    No, sir.

16    **Q.**    Do you know if BrickStreet served as a third-party  
17    administrator for CONSOL's Workers' Compensation at any  
18    time?

19    **A.**    No, sir, I don't.  I do not know.

20    **Q.**    Okay.  But you are not performing any of that type of  
21    consulting work right now; is that right?

22    **A.**    I do a little bit of PR for them in the Bluefield area.

23    **Q.**    For whom?

24    **A.**    For Encova.

25    **Q.**    And do you know whether CONSOL has any ownership



BAILEY - CROSS

1 interest in Encova currently?

2 **A.** No, I have no knowledge of any.

3 **Q.** Okay. You mentioned that you received phone calls in  
4 the past about this case. Who called you?

5 **A.** The first phone call was probably two or three years  
6 ago. I have no idea the name of the individual that called  
7 me at that time.

8 **Q.** Was it someone that worked for CONSOL; that is, was it  
9 someone presently at that time who was then working for  
10 CONSOL?

11 **A.** I think it was someone identified themselves as maybe  
12 an attorney that probably was working for CONSOL.

13 **Q.** Did you speak to that attorney several years ago?

14 **A.** I spoke with that individual, yes, sir.

15 **Q.** Okay. Anybody else who you called -- or who you  
16 remember receiving phone calls from about this case?

17 **A.** I received a call -- I received a subpoena initially  
18 and a call from Mr. Torres, I believe, regarding this case.

19 **Q.** Okay. Any other phone calls you remember receiving?

20 **A.** None that I recall, sir.

21 **Q.** When you became manager of manpower services in the  
22 early '80s -- if I understood your testimony right?

23 **A.** In the late '70s, yes, sir.

24 **Q.** Late '70s, and then on through '85, right?

25 **A.** Yes, sir.

BAILEY - CROSS

1 Q. Who did you report to?

2 A. I reported initially to John Fox, the first two or  
3 three months before I was promoted in '76. And then to BB  
4 Hyler, H-Y-L-E-R.

5 Q. And what was BB Hyler's position at that time?

6 A. As far as I remember, he was Regional Manager of Human  
7 Resources.

8 Q. Okay. And did you continue to report to the Regional  
9 Manager of Human Resources throughout the remainder of the  
10 time you worked out of the Bluefield area for CONSOL?

11 A. Yes, sir.

12 Q. And who succeeded BB Hyler as Regional Manager of Human  
13 Resources in that area?

14 A. Michael Hymes.

15 Q. And so you worked for Mr. Hymes after Mr. Hyler,  
16 correct?

17 A. Yes, sir.

18 Q. You mentioned that CONSOL hired both salaried and  
19 previously union represented miners when they opened  
20 Buchanan Mine; is that right?

21 A. Yes, sir.

22 Q. And you were working, as I understand it, at that  
23 time -- meaning, around 1983 -- when the Buchanan Mine first  
24 opened -- or you were working for Mr. Hyler at that time; is  
25 that right?

BAILEY - CROSS

1     **A.**    No.  I think I was working for Mr. Hymes at that time.

2     **Q.**    Okay.  But it was either Mr. Hyler or Mr. Hymes during  
3     that time?

4     **A.**    Yes, sir.

5     **Q.**    During the time that Buchanan opened?

6     **A.**    Yes, sir.

7     **Q.**    Did you work out of the same office location as those  
8     individuals during that period?

9     **A.**    When I was in Pocahontas, part of the time I was in a  
10    separate facility across the street.  And then when we moved  
11    to Bluefield, Virginia, we were all in the same facility.

12    **Q.**    You are aware that CONSOL presented a new miner  
13    orientation program to individuals that they hired at the  
14    Buchanan Mine, right?

15    **A.**    Yes, sir, I am aware.

16    **Q.**    Do you know who developed that program?

17    **A.**    I can't tell you specifically who put the program  
18    together.  I assume it was the corporate facility, for the  
19    most part.  Probably the legal people, the people from Human  
20    Resources, maybe in conjunction with management in the  
21    Bluefield operations.

22    **Q.**    Did you participate in the development of that  
23    orientation program yourself?

24    **A.**    Not that I recall, sir.

25    **Q.**    Are you aware of a program known as the Buchanan

BAILEY - CROSS

1 Advantage?

2 **A.** I probably have heard that term. I'm not sure exactly  
3 what it means.

4 **Q.** What do you understand insofar as you do understand it?

5 MS. FUNDERBURG: Objection. Calls for  
6 speculation.

7 THE COURT: Sustained.

8 BY MR. PETSONK:

9 **Q.** Do you have any understanding of what it does mean?

10 MS. FUNDERBURG: Objection; asked and answered.

11 THE COURT: The witness may answer.

12 The question is: Do you have any understanding of  
13 what the term "Buchanan Advantage" means?

14 THE WITNESS: I think I do. And to me, it would  
15 be that we were offering better wages and better benefits  
16 to -- a 401(k) plan and things of that nature than  
17 individuals had when they were represented by the UMWA.

18 BY MR. PETSONK:

19 **Q.** Did you ever attend presentations made to coal miners  
20 at the Bluefield office?

21 **A.** I don't ever remember any presentations done at the  
22 Bluefield office. No, sir, I don't think I did.

23 **Q.** But you don't even remember that CONSOL made  
24 presentations to coal miners at the Bluefield office, right?

25 **A.** I do not recall that.

BAILEY - CROSS

1 Q. Okay.

2 MR. PETSONK: I don't have any further questions.

3 THE COURT: Any further questions?

4 MS. FUNDERBURG: Nothing further, Your Honor.

5 THE COURT: Do you need to confer?

6 And may the witness be excused?

7 MS. FUNDERBURG: Yes, Your Honor.

8 MR. PETSONK: Yes.

9 THE COURT: Mr. Bailey, you're excused from the  
10 trial. Do not discuss your testimony with any other witness  
11 in the case until the trial is over.

12 THE WITNESS: Yes, sir.

13 THE COURT: If you need any relief from that, let  
14 me know.

15 THE WITNESS: Thank you, sir.

16 THE COURT: Thank you. And you're excused.

17 THE WITNESS: Mm-hmm.

18 MS. BATES: Your Honor, the defendants call Gerald  
19 Nicholson.

20 THE CLERK: Please take the lectern.

21 **GERALD NICHOLSON, DEFENDANT'S WITNESS, SWORN**

22 THE CLERK: State your name and spell it for the  
23 record.

24 THE WITNESS: Gerald Nicholson, G-E-R-A-L-D,  
25 N-I-C-H-O-L-S-O-N, Nicholson.

NICHOLSON - DIRECT

1 THE CLERK: Thank you. And if you'd please take  
2 the stand.

3 **DIRECT EXAMINATION**

4 **BY MS. BATES:**

5 **Q.** Good morning, Mr. Nicholson.

6 **A.** How are you doing?

7 **Q.** Thank you so much for being here today. Where do you  
8 live, Mr. Nicholson?

9 **A.** I live in Princeton, West Virginia.

10 **Q.** Are you a party to this lawsuit?

11 **A.** No.

12 **Q.** So how did you learn about this trial?

13 **A.** I saw a crowd together in Princeton of guys that was  
14 actually getting together and having a class action lawsuit.  
15 And so I knew that was going on. And then, of course, I got  
16 a call from Chicago and talked to me about the trial at that  
17 time.

18 **Q.** Did you also receive a subpoena to testify?

19 **A.** Yes. Yes, I did.

20 **Q.** Why did you agree to come all the way to Charleston to  
21 testify today?

22 **A.** I had no idea what you wanted out of me. But, you  
23 know, just come and tell what I knowed and tell the truth.  
24 And no reason not to come.

25 **Q.** Well, we appreciate it. Mr. Nicholson, did you ever

NICHOLSON - DIRECT

1 receive CONSOL retiree medical benefits?

2 **A.** I did.

3 **Q.** And did those end?

4 **A.** They did. I had 40 years with CONSOL, and received my  
5 card, and I had it almost a year, and got the letter that  
6 they were ending.

7 **Q.** And actually, could you walk through your career at  
8 CONSOL, starting 40 years before, in the beginning, and just  
9 tell us each time frame where you worked?

10 **A.** Okay. Close as I can. I started in 1970 as an  
11 industrial engineer. I started at the mines that my dad was  
12 working at. I was the first salaried employee in the  
13 family, so they were all UMWA. And at the mines, my dad  
14 worked there. I had three brothers that worked there. My  
15 grandfather worked at that mines. My great grandfather  
16 worked at mines, you know, before I got there.

17 I got four generations that worked at mines. All my  
18 uncles worked there and all my cousins worked there and all  
19 my neighbors worked there. So it was like a family mine.

20 THE COURT: Where was that?

21 THE WITNESS: Turkey Gap.

22 THE COURT: And did the mine have a name?

23 THE WITNESS: The name of it was Turkey Gap.

24 THE COURT: Thank you.

25 Go ahead.

NICHOLSON - DIRECT

1 BY MS. BATES:

2 Q. How long were you at Turkey Gap?

3 A. Two years.

4 Q. And then where did you go?

5 A. We had -- we had a gentleman that was injured  
6 underground and he was about to lose his leg, and they  
7 brought him out of the mine. He was bleeding severely. And  
8 since I'd just gotten out of the Army, I knew how to take  
9 care of that. So I took care of the wound.

10 We had no training in the company anywhere, any of the  
11 companies, so we really didn't -- we received on-the-job  
12 training. There was no training.

13 But the UMWA asked for a class on first aid to help  
14 take care of a person that way. And we asked a gentleman,  
15 Jim Jones -- they were just starting the Training Department  
16 in the mines for CONSOL. Had one man, Jim Jones. Asked him  
17 to come over and put a class on. He didn't show.

18 So they told me to get a book and go in there and talk  
19 to them about first aid. And I did. And some guy come in  
20 and sat in the back of the room and got up and left. And I  
21 went and asked the superintendent where the guy was that was  
22 going to teach the class.

23 He said, well, he came; listened to you, got up and  
24 left. Said he couldn't do any better than I did. And that  
25 gentleman hired me then -- the first person they hired in



NICHOLSON - DIRECT

1 the Training Department. We started the Training Department  
2 in CONSOL at Southern Appalachian Region.

3 **Q.** And was the Training Department part of the Human  
4 Resources Department?

5 **A.** No. It was in the Safety Department at the time.  
6 Later on, it was put in the HR Department.

7 **Q.** So where did you work for the Training Department?  
8 Where were you located?

9 **A.** I worked out of Pocahontas.

10 **Q.** For how long?

11 **A.** In the Southern App, I probably worked there about 20  
12 years.

13 **Q.** And then where did you go?

14 **A.** After the 20 years, they started moving everybody  
15 around. I went to Bluefield, still in the Training  
16 Department. And went to Oakwood, Virginia, still in the  
17 Training Department. And I then left there and went to  
18 Jones Fork, Kentucky. And then my last years was in  
19 Pittsburgh, manager employee development for CONSOL.

20 **Q.** And when did you leave CONSOL?

21 **A.** 2010.

22 **Q.** Was that when you retired?

23 **A.** Yes.

24 **Q.** Were you ever at the Buchanan location?

25 **A.** Yes. I helped get Buchanan started.

NICHOLSON - DIRECT

1 Q. Did you work at the location or did you just visit it?

2 A. I visited.

3 Q. Why did you visit the Buchanan location?

4 A. We would put training classes together for them.

5 People had to have training, according to the law, before  
6 they go underground. And give them the training. My job  
7 was mainly to give underground training and make sure that  
8 they understood what was going on to keep them from being  
9 injured.

10 Q. What years did you give training at Buchanan?

11 A. I'm not sure exactly, but from Day One that it started.  
12 Until -- for about 10 years. But, you know, it was on and  
13 off, because we finally hired a training guy full-time for  
14 Buchanan. And we actually hired HR guys and safety guys,  
15 and I, more or less, trained them to do their job.

16 Q. Were you ever at CONSOL of Kentucky?

17 A. Yes, I was.

18 Q. Was that in a similar capacity?

19 A. I went to CONSOL of Kentucky in HR, but I didn't do --  
20 I actually did a lot of the medical work on bill paying and  
21 stuff like that.

22 Q. When were you at CONSOL of Kentucky?

23 A. I'm not sure the years I was there. I was there for  
24 seven years. It was in the '90s.

25 Q. And I want to get back to the training sessions that

NICHOLSON - DIRECT

1 you did.

2 **A.** Mm-hmm.

3 **Q.** Did you ever conduct orientation sessions for new  
4 employees at CONSOL?

5 **A.** Yes, I did.

6 **Q.** What type of topics did you cover for those orientation  
7 sessions?

8 **A.** I would cover just the underground or the surface  
9 parts, you know, like roof and rib, and mine ventilation,  
10 and just the safety items.

11 **Q.** Did you ever cover benefits at any presentation at  
12 CONSOL?

13 **A.** No, I didn't.

14 **Q.** So you never discussed retiree medical benefits for  
15 CONSOL at any presentation?

16 **A.** No, I didn't. We actually had -- at each location I  
17 went to, Jones Fork and Buchanan, actually had HR people,  
18 and that was their responsibility to cover that.

19 **Q.** Did you ever watch those people give presentations  
20 about CONSOL benefits?

21 **A.** Yes, I did. I actually helped put the books together  
22 and put the slides together and would have -- actually work  
23 with them, getting them ready to teach the classes.

24 **Q.** And when you say you put the book together and the  
25 slides, do you mean for the orientation sessions?

NICHOLSON - DIRECT

1     **A.**    For -- we had books for different parts of it. I might  
2     have a book on electricity, and have a book on HR, have a  
3     book on benefits -- different things, yes.

4     **Q.**    Did you ever prepare materials about CONSOL's benefits?

5     **A.**    Yes.

6     **Q.**    What were those materials?

7     **A.**    That was the handbook they'd give them. They actually  
8     -- they actually give them a handbook where they could  
9     follow you through the classes. They had to sign for that  
10    book. There is a page in it that we put that you actually  
11    signed that you received it. And at the end of it, there  
12    was a page that you tear out that the material was covered.  
13    And every class I went to, they gave the books out, so, you  
14    know, I monitored a lot of classes. But -- they would  
15    actually tear that out and put it in their personnel file.

16    **Q.**    So did you ever present at training classes?

17    **A.**    Yes, I taught. What they would do is they would bring  
18    around 32 -- 32 people in a class -- foreman training --  
19    they would bring to my class. And I taught the whole --  
20    they would bring them out of the workforce, and they would  
21    sign them up on salary, send them over to me. And I have  
22    them there for eight weeks, teaching federal law, state law,  
23    you know, just getting them ready to take the state test.

24    **Q.**    And were benefits covered at any of the foreman  
25    training classes?

NICHOLSON - DIRECT

1     **A.**    No.  What happened is we would bring them from Bishop  
2     Coal Company, Itmann Coal Company, Consolidation Coal  
3     Company and we'd bring them from contract mines and get them  
4     certified.  They were signed up at the mines.  And if I  
5     covered -- I never was a part of that, but if any of that  
6     was covered, it was covered at the mine site.  It was  
7     different.

8     **Q.**    So there was no need to do it as a foreman; is that  
9     what you're saying?

10    **A.**    They didn't have time for it.

11    **Q.**    Did you ever make any other kind of presentations at  
12    CONSOL?

13    **A.**    Yes.  I was in charge of EMT classes.  As a matter of  
14    fact, the Governor of West Virginia put me on the committee  
15    to -- to help put together the EMT mining for the state of  
16    West Virginia.  I taught at the Vo-tech center at night.  
17    And I taught the surface mining, underground mining at  
18    Princeton, and the EMT certification.  And there is probably  
19    20 some classes altogether that I put on for CONSOL.

20    **Q.**    And in any of the classes or presentations or meetings  
21    that you ever presented for CONSOL, did you ever talk about  
22    CONSOL's benefits?

23    **A.**    No.  When it come to something like that, I always  
24    bring in a HR guy to talk about it.  If, you know, like if  
25    there was a engineering problem, I would bring an engineer

NICHOLSON - DIRECT

1 to talk about it. Electric problem, I bring an electric guy  
2 to talk about it. Most of the classes after -- I developed  
3 them; I would train somebody else to teach it.

4 **Q.** I'd like to ask you, do you know personally Emmett  
5 Casey?

6 **A.** I do know Emmett. I consider him a good friend of  
7 mine.

8 **Q.** How do you know him?

9 **A.** He come through my foreman certification class. I  
10 helped him get certified.

11 **Q.** Do you know when that was?

12 **A.** It had to be in the '70s -- I'm not sure. I put so  
13 many of the classes on. But had to be in the '70s. And I  
14 have had Emmett in all kinds of classes since then. Some of  
15 them I taught; some I didn't teach. But I've had him in EEO  
16 classes, managing mines classes, all kinds of management  
17 courses.

18 **Q.** In any of those classes with Mr. Casey, did you ever  
19 tell him anything about CONSOL's retiree medical benefits?

20 **A.** I never did cover benefits.

21 **Q.** And understanding that you didn't -- did you ever tell  
22 him that he would have lifetime retiree medical benefits?

23 **A.** No.

24 **Q.** Did you ever tell him that his retiree medical benefits  
25 from CONSOL would never be terminated?

NICHOLSON - DIRECT

1       **A.**    No.

2       **Q.**    Did you ever tell him that the language reserving  
3       CONSOL's right to change or terminate the plan didn't apply  
4       to him?

5       **A.**    No.

6       **Q.**    Or that he could ignore that language?

7       **A.**    No, I didn't.

8       **Q.**    Do you know personally or remember someone whose name  
9       is Terry Prater?

10      **A.**    No. That doesn't mean I didn't have him in class,  
11      but -- I had thousands of people in classes, but I don't  
12      remember him.

13      **Q.**    You don't remember if you've ever talked to Terry  
14      Prater about benefits at all?

15      **A.**    No.

16      **Q.**    In any conversation with any employee from CONSOL, did  
17      you ever tell anyone that CONSOL's retiree medical benefits  
18      would last for life?

19      **A.**    No.

20      **Q.**    Did you ever tell anyone at CONSOL that the retiree  
21      medical benefits would be vested?

22      **A.**    No.

23      **Q.**    Did you ever hear anyone else at CONSOL describe  
24      benefits that way?

25      **A.**    No, I haven't. And I sat in on a lot -- you know, to

NICHOLSON - DIRECT

1 get started in these orientation classes, I've sat in and  
2 worked with the people at -- HR people. Like -- I don't  
3 know if you want any names or not, but John Fox, when he  
4 first got started, worked with him close, and Ed Davidson,  
5 and Craig Campbell. And I didn't hear any of them say it  
6 was for life or any of that. They read what was on the, you  
7 know, on the slide and in the book.

8 **Q.** Did you ever tell any CONSOL employee ever that their  
9 retiree medical benefits would never be terminated?

10 **A.** No.

11 **Q.** Did you ever lie to any CONSOL employee about their  
12 benefits?

13 **A.** No.

14 **Q.** Did you ever tell them anything different from what was  
15 in the written materials, the plan documents, the Summary  
16 Plan Descriptions?

17 **A.** That's something we learned at an early age, you went  
18 by the book. And, you know, if you got away from the book  
19 whatsoever, just ended up in trouble. And that includes any  
20 safety item. That's what I covered. You had to be very,  
21 very careful. You stayed with what the script was and what  
22 was in the book.

23 **Q.** Did you ever tell any CONSOL employee that they could  
24 ignore or disregard that language reserving CONSOL's right  
25 to change or terminate the benefit plan?



NICHOLSON - DIRECT

1       **A.**    No.

2       **Q.**    Did you ever tell any CONSOL employee that you had  
3 authority to change CONSOL's benefit plan?

4       **A.**    No.

5       **Q.**    Or to promise something outside of what the written  
6 terms said?

7       **A.**    No.

8       **Q.**    Did anyone at CONSOL ever tell you that you had that  
9 kind of authority to change the benefit plan?

10      **A.**    No.

11      **Q.**    Did anyone at CONSOL tell you to misrepresent CONSOL's  
12 retiree medical benefits to employees?

13      **A.**    No, never, no.

14      **Q.**    Or to lie to employees about their benefits?

15      **A.**    No.

16      **Q.**    Did anyone at CONSOL ever tell you to promise employees  
17 lifetime retiree medical benefits?

18      **A.**    No.

19      **Q.**    Or to tell them that those benefits would never be  
20 terminated?

21      **A.**    No.

22      **Q.**    Did anyone at CONSOL tell you to tell employees that  
23 the reservation of rights clause, that the company could  
24 terminate benefits, didn't apply to them?

25      **A.**    No.

NICHOLSON - CROSS

1 Q. Or that they could ignore it?

2 A. No, ma'am.

3 MS. BATES: I don't have any more questions for  
4 you. Thank you, Mr. Nicholson.

5 THE WITNESS: Yes, ma'am.

6 **CROSS-EXAMINATION**

7 **BY MR. PETSONK:**

8 Q. Good morning, Mr. Nicholson.

9 A. Good morning.

10 Q. You testified here that you participated in the process  
11 of developing new miner orientation materials?

12 A. Right.

13 Q. And that included for the Buchanan Mine, right?

14 A. That's correct.

15 Q. And also for the CONSOL of Kentucky, Jones Fork  
16 operations, right?

17 A. Yes, mm-hmm.

18 Q. Did you work with Craig Campbell during that process?

19 A. Some, yes.

20 Q. Did he work in the HR Department at that time?

21 A. Yes.

22 Q. Did you work with Mike Hymes during the development of  
23 those materials?

24 A. I worked for Mike Hymes, but I never -- Mike never  
25 worked with me on any of that, no.

NICHOLSON - CROSS

1 Q. Okay. To clarify the time frame there, you stated that  
2 when you began working in the Training Department in 1972,  
3 the Training Department was underneath the Safety Department  
4 for CONSOL, right?

5 A. That's correct.

6 Q. And then thereafter, it moved -- was transferred to the  
7 Human Resources Department, right?

8 A. That's correct.

9 Q. Do you remember when you were transferred from safety  
10 to Human Resources?

11 A. It would be the late '70s, early '80s.

12 Q. So before the opening of the Buchanan Mine, right?

13 A. That's correct.

14 Q. Who managed you or managed the -- the work that you did  
15 in developing those new miner orientation programs?

16 A. It was just a large group of people worked the CONSOL  
17 plaza would help with some of the information. Anything we  
18 taught had to be approved by Pittsburgh. They would tell  
19 us, start putting a book together. And we'd have to send it  
20 to, for example, to Mike Hymes to look at and to approve.  
21 And then he had to send it to Pittsburgh, and they'd have to  
22 approve it. And we'd look at the changes they made, and  
23 we'd make more changes and we'd go back and forth. Not any  
24 one person did that. It was a group exercise.

25 Q. Sure. And was that process the same throughout the

NICHOLSON - CROSS

1 time that you worked for CONSOL, when it came to developing  
2 materials for presentation to miners?

3 **A.** For safety or anything else, we had a group. You had  
4 to get everything approved before you'd teach it.

5 **Q.** Did that same process unfold for the benefits and Human  
6 Resources part of the presentation?

7 **A.** Yes.

8 **Q.** And when Mike Hymes sent the -- and Mike Hymes was --  
9 at the time you're describing, and once you were in the HR  
10 office, and beginning in the early '80s, -- your testimony  
11 is that Mike Hymes reviewed new miner orientation materials,  
12 and then, thereafter, he had to send them up to his manager  
13 somewhere in the Pittsburgh corporate office; is that right?

14 **A.** That's correct.

15 **Q.** And do you remember who was the -- the senior manager  
16 of Human Resources at that time?

17 **A.** I think it was Buck Hyler. But, again -- you know, I'm  
18 not sure Buck Hyler actually looked at it or had somebody in  
19 his office look it over. And same way with Mike Hymes.  
20 Mike was responsible for that, but I'm not sure if he sat  
21 down and read it word-for-word or had somebody else at the  
22 department look at it.

23 **Q.** Very good. I understand your testimony.

24 Are you aware of a program called the union-free  
25 advantage?

NICHOLSON - CROSS

1       **A.**    No.

2       **Q.**    You've never -- never heard the term before?

3       **A.**    No.

4       **Q.**    The Buchanan advantage?

5       **A.**    I've never heard of the --

6       **Q.**    Have you heard of that --

7       **A.**    What was it?

8                   COURT REPORTER:  I'm sorry.  Please repeat the  
9       question.

10       BY MR. PETSONK:

11       **Q.**    Union-free advantage?

12       **A.**    Union-free -- I'm not sure I heard it in those terms or  
13       not.  But, you know, it sounds familiar, but that's all I  
14       can say.

15       **Q.**    You stated that in your foremen's classes that you  
16       delivered for CONSOL, you didn't cover benefits yourself,  
17       because those topics had already been covered at the mine  
18       site; is that right?

19       **A.**    Right.  And you'd have people from different companies  
20       in there, and you couldn't cover it anyway.  There would be  
21       too many differences.

22       **Q.**    Okay.  And you testified that the presentations that  
23       the Human Resources Department provided to miners included a  
24       script that went along with them; is that right?

25       **A.**    Yes.

NICHOLSON - CROSS

1 Q. And was that script produced through the same process  
2 you described with Mr. Hymes and Mr. -- whoever the superior  
3 was at the time?

4 A. That's correct.

5 Q. Where was the Turkey Gap mine located?

6 A. Next to Matoaka [phonetic], in Princeton, West  
7 Virginia.

8 Q. In Mercer County?

9 A. Right.

10 Q. You mentioned that many of your family members were  
11 UMWA miners; is that right?

12 A. They all were, yes.

13 Q. And did they retire as UMWA miners?

14 A. My great grandfather -- they didn't have any benefits  
15 when he worked. He was a hand loader. My dad was the first  
16 one that retired with benefits. And all my brothers, they  
17 left, got other jobs, because of mining being shut down.  
18 But I had several uncles and a father-in-law that worked and  
19 got retirement, yes.

20 Q. Got UMWA retirement and welfare benefits?

21 A. Mm-hmm.

22 MR. PETSONK: I don't have any further questions,  
23 Your Honor.

24 MS. BATES: May I have a moment, Your Honor?

25 THE COURT: Yes.

NICHOLSON - CROSS

1 (An off-the-record discussion was held between defense  
2 counsel.)

3 MS. BATES: Thank you, Mr. Nicholson. I don't  
4 have any more questions.

5 THE COURT: May Mr. Nicholson be excused from the  
6 trial?

7 MS. BATES: Yes. Thank you.

8 MR. PETSONK: Yes.

9 THE COURT: Mr. Nicholson, you're excused from the  
10 trial. Let me caution you, however, not to discuss your  
11 testimony with any other witness in this case until the  
12 trial is over.

13 THE WITNESS: Okay. And that's -- you don't know  
14 when it's going to be over, right?

15 THE COURT: Right now, we don't, but the plan is  
16 it will be over this week.

17 THE WITNESS: Okay.

18 THE COURT: And so if you need any relief from  
19 that direction, let me know.

20 Thank you, sir, for being with us.

21 THE WITNESS: Thank you.

22 THE COURT: And you're excused.

23 THE WITNESS: Yes, sir. Thank you.

24 THE COURT: Let me ask whether this would be a  
25 good point to recess?

NICHOLSON - CROSS

1 MR. TORRES: Yes, Your Honor.

2 THE COURT: What further witnesses do you have?

3 MR. TORRES: We have one more live witness to  
4 present today, Your Honor, and then we have three video  
5 depositions to present today.

6 THE COURT: And does that conclude your case?

7 MR. TORRES: No. We have Mr. Kowzan, who is  
8 driving up from Florida, Your Honor, if you remember; he's  
9 going to be here for tomorrow. And then we have -- we have  
10 one video deposition that is in process, Your Honor. That  
11 will be concluded tonight and we would present that  
12 tomorrow, along with Mr. Elswick's video testimony.

13 THE COURT: Well, can something be done to advance  
14 that? It sounds to me that you don't have enough to finish  
15 today.

16 MR. TORRES: We can certainly present Mr. Elswick  
17 today. Mr. Mason's deposition was this morning, and we have  
18 the transcript from it, but opposing counsel was not  
19 finished with their examination. And so we could certainly  
20 present that tomorrow, along with Mr. Kowzan.

21 Those would be the last two things we would have to do  
22 tomorrow.

23 THE COURT: When do you plan to finish the  
24 deposition in which you are in the midst?

25 MR. TORRES: This evening, Your Honor.



NICHOLSON - CROSS

1 THE COURT: How long is it going to take to get  
2 it?

3 MR. TORRES: We'll have it done for tomorrow, Your  
4 Honor. It will be transcribed overnight and we can present  
5 it tomorrow.

6 THE COURT: And so tomorrow, it would be that and  
7 Mr. Kowzan. Anything else?

8 MR. TORRES: That's it, Your Honor.

9 THE COURT: How long will Mr. Kowzan take?

10 MR. TORRES: I'm guessing in total, Mr. Kowzan  
11 should take about the same length of these witnesses we've  
12 been seeing today, so 30 to 45 minutes, Your Honor.

13 THE COURT: Very good. It looks to me as though  
14 you could get started in that deposition a lot sooner,  
15 because you don't have much left to do today.

16 MR. TORRES: Yes, Your Honor.

17 THE COURT: We'll be back in 15 minutes.

18 THE CLERK: All rise.

19 (A recess was taken at 11:10 a.m. until 11:30 a.m.)

20 THE CLERK: All rise.

21 THE COURT: Please be seated.

22 MR. TORRES: Thank you, Your Honor.

23 Your Honor, defendants call John Fox.

24 THE CLERK: Mr. Fox, if you'd please raise your  
25 right hand.

FOX - DIRECT

1                   **JOHN FOX, DEFENDANT'S WITNESS, SWORN**

2                   THE CLERK: If you would please state your name  
3 and spell it for the record.

4                   THE WITNESS: John W. Fox. Mailing address is 144  
5 Kimberly Lane, Princeton, West Virginia, 24739.

6                   THE CLERK: And if you would please spell your  
7 name for the record.

8                   THE WITNESS: Pardon?

9                   THE CLERK: Spell your name.

10                  THE WITNESS: John W. Fox.

11                  THE CLERK: If you would please spell it.

12                  THE WITNESS: J-O-H-N, middle name Wayne,  
13 W-A-Y-N-E, last name, F-O-X.

14                  THE CLERK: Thank you.

15                  MR. TORRES: Your Honor, may I remove my mask?

16                  THE COURT: You may.

17                               **DIRECT EXAMINATION**

18                  **BY MR. TORRES:**

19                  **Q.** Good morning, Mr. Fox.

20                  **A.** Good morning.

21                  **Q.** Can you hear me okay?

22                  **A.** Yes.

23                  **Q.** Okay. Great. Mr. Fox, are you a party to this  
24 lawsuit?

25                  **A.** I am.

FOX - DIRECT

1 Q. Did you receive a subpoena to come testify today?

2 A. I'm getting an echo.

3 Q. I'm sorry. Did you receive a subpoena to come testify  
4 today?

5 A. Yes, I did.

6 Q. Are you a defendant in this lawsuit?

7 A. No.

8 Q. Okay. You previously worked at CONSOL Energy, Mr. Fox?

9 A. I did.

10 Q. For what period of time; what was your start date and  
11 your end date?

12 A. I started in 1975 and ended in 2000.

13 Q. Okay. And what happened in 2000?

14 A. Took a retirement.

15 Q. After you retired from CONSOL, did you ever receive  
16 retiree medical benefits from CONSOL?

17 A. I did.

18 Q. Do you recall how long you received them?

19 A. I don't know the specific date.

20 Q. Okay. Why do you no longer receive those benefits?

21 A. They were terminated by the company.

22 Q. Now, when you started in 1975 at CONSOL, Mr. Fox, what  
23 was your position?

24 A. I was a personnel assistant.

25 Q. Okay. When you retired from CONSOL in 2000, what was

FOX - DIRECT

1 your position?

2 **A.** Manager of management development.

3 **Q.** What department was that in?

4 **A.** Pardon?

5 **Q.** What department was that in?

6 **A.** That was in Human Resources.

7 **Q.** Okay. From the time you started from '72 until you  
8 retired in 2000, how many of your jobs at CONSOL were in  
9 Human Resources?

10 **A.** All of them.

11 **Q.** Okay. And very briefly, can you just give us an  
12 overview of what the various locations you were at and the  
13 time periods from '72, Mr. Fox?

14 **A.** From '75, I was at Itmann Coal Company. And I also was  
15 at Rowland Coal Company.

16 **Q.** Let me stop you there. Are those two companies -- were  
17 they owned by CONSOL?

18 **A.** They were owned by CONSOL, managed by CONSOL, in  
19 Raleigh County, West Virginia.

20 **Q.** Okay. Please continue.

21 **A.** And in 19 -- late '75, '76, I was transferred to  
22 Pocahontas, Virginia, at the regional headquarters.

23 **Q.** For CONSOL?

24 **A.** For CONSOL. I was in charge of employment for the four  
25 states area in Southern West Virginia, Virginia, Tennessee,

FOX - DIRECT

1 and Kentucky.

2 Q. And how long did you hold that position?

3 A. Approximately, one year.

4 Q. What happened next?

5 A. And then I was moved and promoted to manager of  
6 compensation and benefits for the Southern Appalachian  
7 Region.

8 Q. For CONSOL?

9 A. For CONSOL.

10 Q. And how long did you hold that position?

11 A. Until 1983.

12 Q. And what happened then?

13 A. 1983, I was transferred to the Buchanan Mine in  
14 Buchanan county, Virginia, and by CONSOL.

15 Q. I'm sorry, if I missed that. What was your title when  
16 you were transferred to Buchanan?

17 A. At Buchanan, I was supervisor of industrial employee  
18 relations.

19 Q. And how long were you at Buchanan?

20 A. 1991, '92.

21 Q. And what happened after -- at that point in time?

22 A. I was transferred -- promoted to the corporate office  
23 in Pittsburgh.

24 Q. And did you have any other positions other than --  
25 after you were transferred to Pittsburgh, other than the

FOX - DIRECT

1 manager of management development?

2 **A.** No. I stayed in that position until I retired.

3 **Q.** Thank you. While you were employed at the Buchanan  
4 Mine, Mr. Fox, we are talking 1982 or '83 to 1991 to 1992?

5 **A.** Correct.

6 **Q.** During that period when you were at Buchanan Mine,  
7 what, if any, involvement did you have in conducting  
8 employee orientations?

9 **A.** I conducted employee orientations for all new hourly  
10 employees referred to as production and maintenance  
11 employees.

12 **Q.** Would that be from when you arrived at Buchanan until  
13 you left in '91, '92?

14 **A.** We started those orientations January 1984, and I did  
15 my last one somewhere in May '91 or '92, somewhere like  
16 that.

17 **Q.** After leaving Buchanan and moving to the corporate  
18 offices, did you ever conduct any other employee  
19 orientations?

20 **A.** No.

21 **Q.** Again, focusing on Buchanan, Mr. Fox, when you  
22 conducted employee orientations at Buchanan, what portions  
23 of the orientation program did you cover?

24 **A.** I covered the employee handbook, and I covered the  
25 union awareness, operating union-free.

FOX - DIRECT

1 Q. Okay. And what, if any, materials did you distribute  
2 during the orientations that you conducted?

3 A. I distributed the employee handbook; also distributed  
4 the Summary Plan Descriptions. There may have been a case  
5 or two where the Summary Plan Descriptions may have been  
6 mailed to the employee's home or we gave them out at the  
7 mine, but, for the most part, they were given out during the  
8 orientation.

9 Q. So they got an employee handbook and Summary Plan  
10 Description?

11 A. Right.

12 Q. And --

13 THE COURT: Let me ask you -- let me interrupt.  
14 What's the difference between the employee handbook and the  
15 Summary Plan Descriptions? What's the difference between  
16 the two?

17 THE WITNESS: The Summary Plan Descriptions go  
18 into extreme detail on each benefit. The Summary Plan  
19 Description is just a general outline of the benefits and  
20 work policies.

21 THE COURT: To what extent is the Summary Plan  
22 Description or parts of it, if any, incorporated into the  
23 employee handbook?

24 THE WITNESS: Just a general mention of that  
25 particular benefit.

FOX - DIRECT

1 THE COURT: You say a general mention?

2 THE WITNESS: Yes.

3 THE COURT: Can you expand on that?

4 THE WITNESS: There was no details. Specific  
5 details of each particular plan was in the Summary Plan  
6 Description. The handbook was just a general overview.

7 THE COURT: What is the handbook saying with  
8 respect to employee retiree medical benefits in the  
9 handbook?

10 THE WITNESS: I don't recall the specifics. It's  
11 been too long.

12 THE COURT: Thank you.

13 BY MR. TORRES:

14 Q. Just to follow-up on the Judge's question, Mr. Fox --  
15 and we might be able to clarify the record.

16 MR. TORRES: Could I have Defendant's 18, Josh?

17 THE COURT: What's the number?

18 MR. TORRES: Defendant's 18, Your Honor.

19 May I approach, Your Honor?

20 THE COURT: You may.

21 BY MR. TORRES:

22 Q. Mr. Fox, I'm going to show you what's been admitted  
23 into evidence as Defendant's Exhibit 18. And taking a look  
24 at the front page of that document, are you familiar with  
25 that document?



FOX - DIRECT

1       **A.**     That looks like what we gave out at orientation.

2       **Q.**     And what -- you said you gave out two booklets at the  
3       orientation; which one would this be?

4       **A.**     This would be the Summary Plan Description of the  
5       benefit plans.

6       **Q.**     Okay. And how did the -- this was -- I know this is a  
7       photocopy, Mr. Fox, but in the actual physical version of  
8       this document, can you explain to the Judge sort of what it  
9       looked like?

10      **A.**     It was in a binder. I don't know if it's a two-ring or  
11      three-ring binder. The holes were prepunched, and employees  
12      just inserted it into the binder.

13      **Q.**     Okay. And --

14               THE COURT: Let me ask you this: The employees  
15      inserted it into a three-ring binder. Did the three-ring  
16      binder consist of something else?

17               THE WITNESS: No, the three-ring binder was just  
18      an empty binder, and they opened it up and put these  
19      prepunched Summary Plan Descriptions into that binder.

20               THE COURT: Thank you.

21               MR. TORRES: May I approach, Your Honor?

22               THE COURT: You may.

23      BY MR. TORRES:

24      **Q.**     Mr. Fox, I'm showing you what's been marked for  
25      identification as Defendant's Exhibit 32. I would like you

FOX - DIRECT

1 to take a look at that and tell me if you're familiar with  
2 it?

3 **A.** Yes, I am familiar with it.

4 **Q.** What is this?

5 **A.** It's the employee handbook for Buchanan Mine.

6 **Q.** And again, realizing that this is a photocopy, can you  
7 explain to the Judge the size of this document that is  
8 reflected in Defendant's Exhibit 32?

9 **A.** The actual document wasn't much bigger, maybe the same  
10 size as your photocopy. It was simply stapled in the corner  
11 for each -- on the side for binding purposes. Just a --  
12 it's a small, small handbook for an employee to carry in  
13 their pocket if they wanted to.

14 **Q.** Okay. And just give me one second, please.

15 If you look at the document, there are page numbers on  
16 the bottom of each page of the photocopy pages?

17 **A.** Mm-hmm.

18 **Q.** And if you turn to Page 24.

19 **A.** Okay.

20 **Q.** And there is a section there that says, "Employee  
21 Benefits"; is that correct?

22 **A.** Yes.

23 **Q.** And then just moving forward in the document, can you  
24 -- can you tell us how many of the pages actually discuss  
25 employee benefits in the employee handbook?

FOX - DIRECT

1     **A.**    It appears that the -- moving forward, there is on page  
2     25 and 26, they are touched upon.

3     **Q.**    Okay.

4     **A.**    25, 26, 27, and actually Workers' Comp was on Page 28.

5     **Q.**    Okay.  So that would be a section that covered employee  
6     benefits, at least in the handbook?

7     **A.**    Pardon?

8     **Q.**    That would be the section that covered employee  
9     benefits?

10    **A.**    Correct.  Correct.

11                 MR. TORRES:  Your Honor, defendants offer Exhibit  
12     32.

13                 MR. PETSONK:  No objection.

14                 THE COURT:  Admitted.

15                 **Defendant's Exhibit 32 admitted.**

16     BY MR. TORRES:

17     **Q.**    So getting back to my questions about the orientation  
18     that you conducted, Mr. Fox, while you were at Buchanan.

19     **A.**    Okay.

20     **Q.**    With respect to the employee handbook, what portions of  
21     this do you recall covering during the orientations that you  
22     conducted?

23     **A.**    Well, we went over the handbook from beginning to end  
24     and read it word-for-word to all employees; gave them the  
25     opportunity to ask any questions about the handbook, about

FOX - DIRECT

1 benefits or work practices, whatever. But it was covered in  
2 its entirety. In fact, if I'm not mistaken, on the last  
3 page, there was a page there for a signature, and they tore  
4 that page out and handed it back, and it was just to make  
5 sure I remember covering it with them.

6 **Q.** Okay. And do you recall what, if anything, the  
7 employee handbook said about the company's right to  
8 terminate or change benefits?

9 **A.** Yeah. The company reserved that right, and it's in the  
10 employee handbook, and may have been in the Summary Plan  
11 Description, as well, that the employee -- the company had  
12 the right to change those benefits.

13 **Q.** Okay. So again, directing your attention to the  
14 numbered page 1 in the employee handbook, Mr. Fox?

15 **A.** Okay.

16 **Q.** Can -- and then there is a section that says,  
17 "Handbook," correct?

18 **A.** Yes.

19 **Q.** And there is a -- can you point out in that section  
20 where the reservation of rights language is contained in the  
21 employee handbook?

22 **A.** Mm-hmm. Give me that question again.

23 **Q.** Sure. Can you point out under that heading, "About  
24 Your Handbook," can you point out where the reservation of  
25 rights language is contained?

FOX - DIRECT

1 MR. PETSONK: Objection. Lack of foundation, Your  
2 Honor. I'm not sure he's --

3 THE COURT: I can't hear you.

4 MR. PETSONK: I don't think he's established that  
5 there is a reservation of rights in this section, Your  
6 Honor.

7 THE COURT: Well, let's let counsel develop it and  
8 you can cross.

9 BY MR. TORRES:

10 **Q.** Do you remember the question, sir?

11 **A.** Yes. The last portion of that paragraph about your  
12 handbook reserves the right to modify, revoke, change or  
13 alter plans, policies or procedures at any time.

14 THE COURT: Now, where is that? Which page?

15 MR. TORRES: Bates Number page 1, Your Honor, in  
16 the heading "About Your Handbook."

17 BY MR. TORRES:

18 **Q.** Just so we are clear for the record, Mr. Fox, the  
19 language that you read is in a sentence that begins, "While  
20 Consolidation Coal believes whole-heartedly," -- correct?

21 **A.** Correct.

22 **Q.** And it goes on to say, "Consolidation Coal Company  
23 reserves the right to modify, revoke, or change any or all  
24 such plans, policies, or procedures at any time," correct?

25 **A.** That's correct.

FOX - DIRECT

1 Q. And that's the language you were referring to?

2 A. Correct.

3 Q. And that's what -- part of what you would have read to  
4 the employees during that orientation?

5 A. Yes.

6 Q. Okay. And then you mentioned a moment ago that one of  
7 the other things that would be distributed during the  
8 orientation was the Summary Plan Description; is that  
9 correct?

10 A. Correct.

11 Q. And you testified that your recollection is that also  
12 contained reservation of rights language, correct?

13 A. Yes.

14 Q. Okay.

15 MR. TORRES: Your Honor? Your Honor?

16 THE COURT: Yes.

17 MR. TORRES: I'm having a bit of a nasal drip.

18 Could I have a minute just to grab a tissue?

19 THE COURT: You may.

20 MR. TORRES: Thank you, Your Honor. I apologize.

21 BY MR. TORRES:

22 Q. Mr. Fox, when you were conducting the orientation in  
23 addition to distributing the handbook and the Summary Plan  
24 Description you've already testified to, did you use any  
25 slides during your employee orientation?

FOX - DIRECT

1       **A.**    Yes, we did.

2       **Q.**    Okay.  What -- focusing on employee benefits, do you  
3       recall what was on the slides that you used during the  
4       orientation?

5       **A.**    I do not remember any specifics on slides.  They were  
6       just general.

7       **Q.**    And with respect to the reservation of rights language  
8       that we were discussing a moment ago, do you recall if there  
9       was anything in those slides referring to the reservation of  
10      rights language?

11      **A.**    No, I do not.

12      **Q.**    Okay.  And other than slides, Mr. Fox, do you recall if  
13      you used any scripts when you were conducting orientations  
14      at Buchanan?

15      **A.**    There was a script, but I did not use a script.

16      **Q.**    You did not use a script?

17      **A.**    I did not use a script.

18      **Q.**    Okay.  Mr. Fox --

19                   MR. TORRES:  Could I have 10-A and 14, please?

20                   Your Honor, may I approach?

21                   THE COURT:  You may.

22      BY MR. TORRES:

23      **Q.**    Mr. Fox, I'm going to show you two documents that have  
24      already been introduced into evidence.  The first one is  
25      Plaintiff's Exhibit 10-A.  Do you have it in front of you?

FOX - DIRECT

1 Do you have 10-A in front of you?

2 **A.** Yes.

3 **Q.** And I want to direct your attention to -- I'm sorry.

4 First off, does that document look familiar to you, Mr.  
5 Fox?

6 **A.** No.

7 **Q.** And directing your attention to the top of Plaintiff's  
8 10-A, there is a paragraph that begins, "Part of this is  
9 lawyer talk." Do you see that?

10 **A.** I do.

11 **Q.** Can you read that first paragraph, and let me know when  
12 you're done, Mr. Fox. Read it just to yourself, not out  
13 loud.

14 **A.** (Witness complies.) Okay.

15 **Q.** Mr. Fox, in the orientations that you conducted at  
16 Buchanan, do you ever recall using any of the language  
17 that's included in that first paragraph I just had you read?

18 **A.** No.

19 **Q.** Do you ever recall using the term "Lawyer talk" during  
20 any of the orientations you conducted at Buchanan?

21 **A.** No.

22 **Q.** And if you turn now to Plaintiff's Exhibit 14, Mr. Fox?  
23 First off, again, are you familiar with this document?

24 **A.** No.

25 **Q.** Have you ever seen it before?



FOX - DIRECT

1       **A.**     No.

2       **Q.**     And again, I'd ask you if you could read to yourself  
3       the paragraph at the very top of Plaintiff's Exhibit 14.  
4       Let us know when you are done. Up to the word, "The right  
5       to change them."

6       **A.**     Okay.

7       **Q.**     Mr. Fox, in any of the orientations that you conducted  
8       at Buchanan, do you recall ever reading any of the language  
9       that's contained in the paragraph I just had you read?

10      **A.**     No.

11      **Q.**     And again, you never recall using the word "Lawyer  
12      talk" in any of the orientations that you conducted?

13      **A.**     No.

14      **Q.**     Thank you. Let me take those back from you so I can  
15      return them from where they came. Just the top two. Thank  
16      you.

17                   MR. TORRES: Thank you, Josh.

18                   THE CLERK: Thank you.

19      BY MR. TORRES:

20      **Q.**     Now, you already testified that one of the things you  
21      did in your orientations was read the reservation of rights  
22      language from the employee handbook, correct?

23      **A.**     Yes.

24      **Q.**     And in the orientations that you conducted, do you  
25      recall saying anything else to employees about the

FOX - DIRECT

1 reservation of rights language, other than reading the  
2 language that was contained in the handbook?

3 **A.** That was it.

4 **Q.** And during the course of your orientation, you said you  
5 also covered -- I think you called it union-free. Did I  
6 recall that correctly?

7 **A.** Yes.

8 **Q.** And I'll ask you specifically about the topics you  
9 covered regarding that in one second. But as part of the  
10 orientation where you were talking about union-free, do you  
11 recall making any comparison between CONSOL's benefits and  
12 UMWA benefits?

13 **A.** I did not make any comparison.

14 **Q.** You did not?

15 **A.** I did not.

16 **Q.** And can you tell us just generally -- for purposes of  
17 the union-free portion of your orientation, can you tell us  
18 what you recall covering during that section?

19 **A.** Well, we covered the benefits of being union-free  
20 versus represented from the standpoint of our wages were  
21 higher, our -- you had no -- you didn't have to pay union  
22 dues and assessments enforced by the union. All of that was  
23 -- did not apply to Buchanan Mine.

24 **Q.** So just so we are clear, you said you talked about the  
25 benefits. You mean the advantages?

FOX - DIRECT

1       **A.**     Pardon?

2       **Q.**     You said you talked about the benefits of being --

3       **A.**     Union-free, correct.

4       **Q.**     But you mean that as the pros -- not benefits in the  
5       sense that you talked about employee benefits; is that  
6       correct?

7       **A.**     Correct.

8               MR. PETSONK: I'm going to object to the form of  
9       the question, Your Honor. He's directing the witness.

10              MR. TORRES: I'll restate the question, Your  
11       Honor.

12              THE COURT: Go ahead.

13       BY MR. TORRES:

14       **Q.**     It doesn't matter. Your testimony is fine, Mr. Fox.  
15       We can move on.

16              Mr. Fox, do you know Emmett Casey? Are you familiar  
17       with him?

18       **A.**     I'm acquainted with him.

19       **Q.**     And do you recall if you ever conducted an orientation  
20       at Buchanan when Mr. Casey was present?

21       **A.**     Right before I left the mine, going to Pittsburgh he  
22       was in one of the last classes I presented.

23       **Q.**     Other than the orientation that you recall where Mr.  
24       Casey was present at, do you recall any other meetings where  
25       you conducted a presentation when Mr. Casey was present?

FOX - DIRECT

1       **A.**    I wouldn't have done any more presentations after that.

2       **Q.**    Okay.  And did you ever tell Mr. Casey that he would  
3       have lifetime retiree medical benefits?

4       **A.**    I did not.

5       **Q.**    Did you ever tell Mr. Casey that his retiree medical  
6       benefits would vest?

7       **A.**    No.

8       **Q.**    Did you ever tell Mr. Casey that his benefits would  
9       never be terminated?

10      **A.**    No.

11      **Q.**    Did you ever tell Mr. Casey to ignore or disregard the  
12      language in CONSOL's SPD that said CONSOL had the right to  
13      modify or terminate benefits?

14      **A.**    No.

15      **Q.**    Did you ever tell Mr. Casey that you had authority to  
16      promise him something different from what was written in  
17      CONSOL's plan documents or Summary Plan Descriptions?

18      **A.**    No.

19      **Q.**    Did you ever describe CONSOL's benefits to any  
20      employees while you were conducting your orientations at  
21      Buchanan as vested?

22      **A.**    No.

23      **Q.**    Did you ever describe CONSOL's retiree benefits to  
24      employees at any orientation you conducted at the Buchanan  
25      as lifetime or lifelong?

FOX - DIRECT

1       **A.**    No.

2       **Q.**    Did you ever tell any employee at any of the  
3       orientations that you conducted at Buchanan that CONSOL's  
4       retiree medical benefits would never change?

5       **A.**    No.

6       **Q.**    Did you ever tell any employee at any of the  
7       orientations you conducted at Buchanan that CONSOL's retiree  
8       medical benefits would never be terminated?

9       **A.**    No.

10      **Q.**    Mr. Fox, did you ever lie to employees about their  
11      benefits or the duration of those benefits?

12      **A.**    No.

13      **Q.**    Did you ever tell any employee something different than  
14      what was in CONSOL's plan documents and employee handbooks  
15      regarding their benefits?

16      **A.**    No.

17      **Q.**    Did you ever tell any employee to ignore or disregard  
18      the reservation of rights language in the employee handbook?

19      **A.**    No.

20      **Q.**    Or in the Summary Plan Description?

21      **A.**    No.

22      **Q.**    Did you ever tell any employee at any of the  
23      orientations you conducted at Buchanan that you have the  
24      authority to promise them something different than what was  
25      written in their plan documents and Summary Plan

FOX - DIRECT

1 Descriptions?

2 **A.** No.

3 **Q.** Did the -- during the presentations you conducted at  
4 Buchanan, did you ever tell employees that retiree medical  
5 benefits would be provided for life?

6 **A.** No.

7 **Q.** During the presentations you conducted at Buchanan, did  
8 you ever tell employees that reservation of rights in  
9 CONSOL's benefit plans did not apply to retiree medical  
10 benefits?

11 **A.** No.

12 **Q.** Did anyone from CONSOL ever tell you you had the  
13 authority to alter the terms of CONSOL's written benefit  
14 plan?

15 **A.** No.

16 **Q.** Did anyone from CONSOL tell you to lie to employees  
17 regarding CONSOL's retiree medical benefits?

18 **A.** No.

19 **Q.** Did anyone at CONSOL tell you to mislead employees  
20 regarding CONSOL's retiree medical benefits?

21 **A.** No.

22 **Q.** Did anyone at CONSOL tell you to promise employees that  
23 retiree medical benefits would vest or last throughout their  
24 lifetimes?

25 **A.** No.

FOX - CROSS

1 Q. Did anyone from CONSOL tell you to tell employees that  
2 retiree medical benefits would never be terminated?

3 A. No.

4 Q. Did anyone from CONSOL tell you to tell employees to  
5 ignore or disregard the reservation of rights language in  
6 the plan documents --

7 A. No.

8 Q. -- or any employee handbook?

9 A. No.

10 Q. And did anyone from CONSOL ever tell you to tell  
11 employees that the reservation of rights clause in CONSOL's  
12 written benefit plans did not apply to retiree medical  
13 benefits?

14 A. No.

15 MR. TORRES: Thank you, Mr. Fox. I don't have any  
16 further questions.

17 **CROSS-EXAMINATION**

18 **BY MR. PETSONK:**

19 Q. Mr. Fox, do you still have in front of you those  
20 documents that Mr. Torres was asking you about a moment ago?

21 A. I didn't hear the first part of your question.

22 Q. Do you have those documents in front of you that Mr.  
23 Torres asked about?

24 A. I have the Buchanan employee handbook and the Summary  
25 Plan Descriptions, yes.

FOX - CROSS

1 Q. The handbook is marked Defendant's Exhibit 32.

2 Do you see that?

3 A. I do.

4 Q. Can you open that document -- access that document?

5 A. Okay.

6 Q. If you flip to page 4 -- or pages 3 and 4, which are  
7 included on the same page in this exhibit?

8 A. Okay.

9 Q. These are from the employee handbook, which was a  
10 small, sort of a pocket-sized handbook for employees, right?

11 A. They appear to be the same, yes.

12 Q. And do you see that there is a section beginning at the  
13 bottom of page 3 called: "Management Philosophy - Working  
14 Together"?

15 A. Mm-hmm.

16 Q. And it says, "Mutual respect and trust are an important  
17 part of the good relationship we seek to maintain among all  
18 employees at the Buchanan Mine"; is that right?

19 A. Yes.

20 Q. And on the next page, at page 4, it says -- about  
21 CONSOL's philosophy. Is that right?

22 A. "Our philosophy," yes.

23 Q. And I'm going to read you three of the sentences  
24 comprising the first full paragraph on that page.

25 "Employees at Buchanan Mine have and receive



FOX - CROSS

1 competitive wages, benefits, and working conditions as  
2 compared with other employees in the area. Buchanan Mine  
3 management surveys other companies in the areas around us to  
4 assure that the pay, benefits, and work practices at our  
5 mine are competitive or better. If changes need to be made  
6 in order to remain competitive or better, we will do it."

7 Do you see that?

8 **A.** I do.

9 **Q.** Did you present that part of the employee handbook to  
10 people in the orientation sessions you've described, as  
11 well?

12 **A.** We would have read that in the orientation.

13 **Q.** From 1982 to 1992, while you were the supervisor of  
14 industrial employee relations at the Buchanan Mine, who was  
15 your supervisor in the Human Resources Department?

16 **A.** I was there from '83 to '90 -- or '91, '92. Not '82.

17 **Q.** Okay. During that period, who was your supervisor in  
18 the Human Resources Department?

19 **A.** I had a functional responsibility to Mike Hymes. And I  
20 reported directly to the superintendent.

21 **Q.** For day-to-day operations at the mine, you reported to  
22 the superintendent?

23 **A.** Right.

24 **Q.** But for human resources management, you reported to  
25 Mike Hymes?

FOX - CROSS

1       **A.**     Mike Hymes.

2       **Q.**     And he was the Regional Manager for Human Resources for  
3       CONSOL in the area at that time?

4       **A.**     That's correct.

5       **Q.**     Did Mr. Hymes --

6               MR. PETSONK:   Well, let me approach, if I may,  
7       Your Honor?

8               Your Honor, may I approach?

9               THE COURT:    You may.

10              THE CLERK:    Plaintiff's 29.

11              MR. POMPONIO:   What number are we on?

12              MR. PETSONK:   29.   Is that correct?

13              I thought that the Plan Amendment was 29.   I  
14       thought we were on 30.

15              THE CLERK:    That's actually correct.   If I could  
16       do that again.   Plaintiff's Exhibit 30.

17              MR. PETSONK:   May I approach, Your Honor?

18              THE COURT:    Now, what's the number of this  
19       exhibit?

20              MR. PETSONK:   Plaintiff's 30.

21              THE COURT:    Pardon?

22              MR. PETSONK:   Plaintiff's 30.

23              THE COURT:    30.

24              THE CLERK:    Is this different than what was just  
25       handed to the Court?

FOX - CROSS

1 MR. PETSONK: I'm sorry, you've already got a copy  
2 of it.

3 THE COURT: Josh, is that 30?

4 THE CLERK: Plaintiff's 30.

5 THE COURT: Thank you.

6 BY MR. PETSONK:

7 **Q.** You can use this to fasten the exhibit back together.

8 **A.** Thank you.

9 MR. TORRES: Could I see the exhibit, please? I'd  
10 like a copy.

11 MR. PETSONK: Okay. This is -- this is what's  
12 identified.

13 MR. TORRES: You don't have a copy?

14 MR. PETSONK: I probably do have a copy.

15 MR. TORRES: I'd like a copy of the document if  
16 you are going to question on it.

17 MR. PETSONK: Okay.

18 BY MR. PETSONK:

19 **Q.** Mr. Fox, Mike Hymes testified in this case that he gave  
20 you this exhibit. Do you recall receiving this from Mr.  
21 Hymes?

22 **A.** This particular Exhibit has "Bailey Mine" on it, but I  
23 don't remember -- I didn't receive anything from Bailey.

24 **Q.** On the first page, there is a handwritten note that  
25 indicates that it should be used at the -- it should be used

FOX - CROSS

1 for some purpose. Do you see that note?

2 **A.** I see that at the top.

3 **Q.** Mr. Hymes testified he gave this to you to use in  
4 developing the new miner orientation at the Buchanan Mine?

5 **A.** I don't recall that.

6 **Q.** Can you flip through the document, and there is a slide  
7 labeled Slide 42. Can you read the text that accompanies  
8 that slide?

9 **A.** It's going to take me a while to get to it.

10 THE COURT: Where is Slide 42?

11 THE WITNESS: What page is it on?

12 MR. PETSONK: Bear with me one second.

13 I'll show you --

14 THE COURT: Where is it?

15 MR. PETSONK: It's on the page stamped 622, Your  
16 Honor.

17 BY MR. PETSONK:

18 **Q.** Can you read the text?

19 THE COURT: Hold just a moment. Go ahead.

20 MR. TORRES: Your Honor, I'm going to object to  
21 the question. Because before he has him start reading  
22 portions of this document, he should establish a foundation  
23 as to whether the witness is familiar with the document.  
24 He's already said he doesn't recall receiving it.

25 THE COURT: Sustained.

FOX - CROSS

1 MR. PETSONK: I was going to ask him, Your Honor,  
2 if --

3 THE COURT: Ask him whether he's familiar with the  
4 document and lay a foundation for what you want to go on to.  
5 BY MR. PETSONK:

6 Q. I've directed you to page 622. Have you also had the  
7 chance to review that page?

8 A. I don't remember seeing this.

9 Q. Okay. Does this -- does this look similar to any  
10 materials that you do remember receiving from Mr. Hymes?

11 A. I can't answer that. I don't know.

12 Q. Do you remember receiving from Mr. Hymes any materials  
13 that compared the Buchanan benefits, the Buchanan nonunion  
14 or P&M benefits to the benefits offered under the United  
15 Mine Workers benefit claim?

16 A. I do not remember that.

17 Q. So you don't recognize this document and you don't --  
18 do you recall Mr. Hymes giving you instruction about the  
19 contents of the new miner orientation program at Buchanan?

20 A. No.

21 Q. Who did instruct you about the contents that you were  
22 to include in the materials you presented at the new miner  
23 orientation during those years you testified you presented  
24 that orientation?

25 A. I don't remember specifically, but we all reviewed it

FOX - CROSS

1 as a group in Human Resources prior to the presentation  
2 and decided consequently that we would give out the Summary  
3 Plan Descriptions in the orientation and we would cover the  
4 handbook word-for-word. And that's what we did.

5 **Q.** How many days was the orientation program that you  
6 delivered during that period that you provided new miner  
7 orientation at the Buchanan Mine?

8 **A.** Would you ask that question again?

9 **Q.** How many days long was the new miner orientation  
10 program that you delivered at the Buchanan Mine?

11 **A.** It comprised of six days; five-day classroom, one day  
12 mine.

13 **Q.** When you -- when you -- okay, bear with me one second.

14 **MR. PETSONK:** Your Honor, I would move for  
15 admission of this document, because, you know -- the witness  
16 has testified that he was managed by Mr. Hymes and that he  
17 consulted with his management group in developing the new  
18 miner orientation materials for use at Buchanan Mine. And  
19 that, you know, that this -- Mr. Hymes testified that he  
20 gave this document to Mr. Fox for use in that process. And  
21 I think it's probative of the direction that Mr. Fox  
22 received about the contents of those programs.

23 And so he -- I'd like to question him about whether his  
24 manager --

25 **THE COURT:** You moved for its admission. Anything

FOX - CROSS

1 else?

2 MR. PETSONK: No, sir.

3 THE COURT: Mr. Torres.

4 MR. TORRES: Your Honor, this -- in addition to  
5 that being a gross mischaracterization of Mr. Fox's  
6 testimony, he hasn't laid a foundation. The gentleman said  
7 he's never seen the document before; doesn't recall it. So  
8 there is no foundation for him to then further question him  
9 about a document he's already testified he's never seen  
10 before.

11 THE COURT: Anything further on the point?

12 MR. PETSONK: No, Your Honor.

13 THE COURT: The objection is sustained.

14 MR. PETSONK: May I approach, Your Honor?

15 THE COURT: You may.

16 THE CLERK: Plaintiff's 31.

17 MR. TORRES: May I have a copy of the document,  
18 please?

19 MR. PETSONK: Yes.

20 BY MR. PETSONK:

21 **Q.** Mr. Fox, I've handed you what's been marked Plaintiff's  
22 Exhibit 31. And it is stamped with sequential numbers  
23 beginning on the bottom right-hand side of the first page,  
24 labeled CONSOL 025675, and it runs through CONSOL 025766.  
25 Do you see this?

FOX - CROSS

1       **A.**     Yes, I see the numbers, yes.

2       **Q.**     Does this document look familiar to you?

3       **A.**     It may be copies of slides, but I can't verify that  
4       they were slides used at Buchanan.

5       **Q.**     Well, take a look through the -- through the document,  
6       if you need to. I know it's a lengthy document here.

7               MR. TORRES: Your Honor.

8               THE COURT: Yes.

9               MR. TORRES: I don't see that this document was  
10       included in the materials that the plaintiffs included on  
11       the pretrial submission. I also think this is somewhat  
12       beyond the scope of the direct examination.

13              MR. PETSONK: Well, Your Honor, I'm sure that we  
14       did not designate this document I'm cross-examining about  
15       it. This document was produced by the defendants, and --

16              THE COURT: The question was whether or not you  
17       had noted this document in the pretrial order?

18              MR. PETSONK: No, Your Honor, we had not. This  
19       was a document -- you know, I simply seek to use this  
20       document to cross-examine the witness. It was produced by  
21       the defendants. And I should also note, it was  
22       characterized in the defendant's 30(b)(6) deposition as a  
23       document that was utilized at the Buchanan Mine.

24              And Mr. Fox's knowledge about the use of slides at the  
25       Buchanan Mine is also represented in the 30(b)(6) deposition



FOX - CROSS

1 based on the corporation's interview of Mr. Fox about what  
2 he did at the Buchanan Mine.

3 MR. TORRES: Your Honor, the document Mr. Petsonk  
4 is referring to is a document from the 2000s. That's what  
5 the testimony was at the 30(b)(6) deposition, which was  
6 after the period of time that Mr. Fox testified he was  
7 conducting orientations. So it's beyond the scope, Your  
8 Honor, and I can establish that by voir diring the witness.  
9 He's already said he doesn't know whether it was used at  
10 Buchanan. And I don't think that this is appropriate  
11 testimony from a document from a period after Mr. Fox  
12 testified he no longer conducted orientations at the  
13 Buchanan Mine.

14 THE COURT: You may take your witness on voir  
15 dire.

16 MR. TORRES: Thank you, Your Honor.

17 MR. PETSONK: Hold on. Your Honor, I'm going to  
18 remove myself and all my materials from this stand so Mr.  
19 Torres can have access to it.

20 MR. TORRES: And, I'm sorry, this is 31? That's  
21 what you marked this?

22 MR. PETSONK: Right.

23 **VOIR DIRE EXAMINATION**

24 **BY MR. TORRES:**

25 **Q.** Mr. Fox, you testified earlier that you left Buchanan

FOX - CROSS

1 in 1991 or 1992; is that correct?

2 **A.** That's correct.

3 **Q.** And I believe you also testified that after you left  
4 Buchanan, you didn't conduct any further employee  
5 orientations; is that correct?

6 **A.** That's correct.

7 **Q.** And after you left Buchanan, did you have any  
8 involvement in the development of any employee orientations  
9 that may have been used at Buchanan?

10 **A.** No.

11 **Q.** Did you have any involvement in any orientations that  
12 were used at any other location for first line employee  
13 orientations?

14 **A.** No, not to my knowledge.

15 **Q.** This document that is in front of you, had you ever  
16 seen this before today?

17 **A.** Honestly, I've never -- I don't think I've ever seen  
18 this document.

19 **Q.** Okay. And do you know where it came from?

20 **A.** No.

21 **Q.** Do you know who prepared it?

22 **A.** I do not.

23 **Q.** Do you know where it may have been used?

24 **A.** No.

25 **Q.** Do you know when it may have been used?

FOX - CROSS

1       **A.**     No.

2                 MR. TORRES: Your Honor, I'll renew my objection.  
3     This is not a document this gentleman used in any  
4     orientations that he testified to. He hasn't seen it before  
5     or doesn't know where it was from or who created it, or  
6     anything else about this document, or whether it was even  
7     used at the Buchanan location.

8                 There is no foundation for it to be introduced during  
9     the witness' testimony. And it's certainly beyond the scope  
10    of the direct examination, given his statement that he's  
11    never seen it before and didn't use it. And I further,  
12    again, note it wasn't disclosed by the plaintiffs in their  
13    pretrial submissions.

14                THE COURT: Thank you.

15                Anything further on the point?

16                MR. PETSONK: Well, Your Honor, this witness --  
17    first of all, we are simply using this document for  
18    cross-examination and to seek to impeach the testimony on  
19    direct. And this was -- this document was produced by the  
20    defendants as a document having been presented at Buchanan.  
21    And the witness -- and neither the witness nor the defendant  
22    seems to possess the actual slideshows that they did use  
23    during the period that Mr. Fox was at Buchanan.

24                And Mr. Fox -- Mr. Fox indicated the materials did not  
25    materially change over time. And I can, you know, question

FOX - CROSS

1 him further about that, Your Honor. And if I may --

2 MR. TORRES: Your Honor, he never said any such  
3 thing. It's a gross misstatement of this gentleman's  
4 testimony. He never said any such thing.

5 Mr. Petsonk keeps throwing things in that are just  
6 simply not true, Your Honor. And I'm not sure if there is  
7 any exception to foundation, that is, I don't have a  
8 document from 1980, so can I ask him about some other  
9 document from some other period of time?

10 That's not an appropriate response to the lack of  
11 foundation that's been established.

12 He keeps referring to this 30(b)(6) deposition  
13 testimony, Your Honor, but the fact remains, that this  
14 gentleman testified today, under oath, that the last time he  
15 was at the Buchanan Mine was 1991, 1992. And he's testified  
16 under oath, he doesn't know where this document came from;  
17 he wasn't involved in its preparation; he doesn't know how  
18 it was used; he didn't use it at Buchanan.

19 So I renew my objection, Your Honor. I don't think  
20 anything Mr. Petsonk said even adequately responds to any of  
21 that .

22 MR. PETSONK: Your Honor, may I inquire?

23 THE COURT: No. You can argue the point. I'm  
24 going to rule on this now.

25 MR. PETSONK: Your Honor, from 1991 until the year

FOX - CROSS

1 2000, Mr. Fox testified that he was the manager of  
2 management development and a more senior position within  
3 CONSOL Human Resources Department.

4 And Mr. Fox told the 30(b)(6) representative -- and the  
5 corporation testified, in its 30(b)(6) deposition that Mr.  
6 Fox said it's his understanding the material would -- did  
7 remain generally the same throughout the period he worked  
8 there, at least, that is, the new employee training  
9 materials.

10 So this is the very best evidence that Mr. Fox  
11 characterized as reflecting, Your Honor, the contents of the  
12 new miner orientation program during the time that Mr. Fox  
13 worked at the Buchanan Mine site and then thereafter, during  
14 the time that Mr. Fox worked in a more senior Human  
15 Resources position as manager of management development.

16 So I simply, because he had knowledge directly about  
17 the mine site, he's also --

18 THE COURT: Who had knowledge directly?

19 MR. PETSONK: Mr. Fox had knowledge about what he  
20 conveyed at the mine site, and he also has knowledge about  
21 Human Resources practices in his capacity as a Senior Human  
22 Resources Manager, Your Honor.

23 THE COURT: He told you that he doesn't recall  
24 anything about this document.

25 MR. PETSONK: Well, Your Honor, he's not had the

FOX - CROSS

1 chance to be questioned about the -- the contents of the  
2 document. It's a lengthy document.

3 THE COURT: The objection is sustained.

4 MR. PETSONK: May I approach, Your Honor?

5 THE COURT: You may.

6 MR. PETSONK: What is this document?

7 THE CLERK: 32. Plaintiff's Exhibit 32.

8 BY MR. PETSONK:

9 Q. Mr. Fox, I've presented you a document that CONSOL has  
10 produced in this case reflecting a discussion comparing the  
11 CONSOL nonunion benefits to union benefits. Does this  
12 document look familiar to you?

13 A. It does not.

14 Q. You testified earlier that you made comparisons between  
15 the CONSOL nonunion benefits and union benefits, right?

16 MR. TORRES: Objection. Misstates the prior  
17 testimony.

18 THE WITNESS: I don't recall saying that.

19 BY MR. PETSONK:

20 Q. Okay. Do you recall being interviewed by a person  
21 named Erica Fisher from CONSOL in connection with this case,  
22 Mr. Fox?

23 A. I don't remember the name.

24 Q. Okay. Do you recall making presentations to miners at  
25 Buchanan about the advantage of working union-free?

FOX - CROSS

1       **A.**    Yes, we made some presentations, yes, to the advantage  
2       of working union-free.

3       **Q.**    And in those presentations, did you compare the  
4       benefits under CONSOL's nonunion plan to the benefits  
5       available to miners under the United Mine Workers?

6       **A.**    I do not recall making any comparison between the two  
7       in the terms of benefits.

8       **Q.**    Do you recall making any comparisons between those two  
9       plans in the benefits at all?

10      **A.**    No.

11      **Q.**    And so when you look at this document that describes  
12      the union-free advantage by comparing CONSOL benefits to  
13      UMWA benefits, this document looks completely unfamiliar to  
14      anything that you ever presented to anybody at Buchanan  
15      during the time you worked there, right?

16      **A.**    I don't -- I don't recall using anything like that. I  
17      don't.

18               MR. PETSONK: Well, Your Honor, I move for its  
19      admission.

20               MR. TORRES: Your Honor, he hasn't laid a  
21      foundation. I can voir dire the witness further, if Your  
22      Honor would like to establish that.

23               THE COURT: You may do so.

24               MR. TORRES: Thank you, Your Honor.

25

FOX - CROSS

**VOIR DIRE EXAMINATION****BY MR. TORRES:**

**Q.** Mr. Fox, you have an exhibit in front of you, Number 32?

**A.** Yes, I do.

**Q.** Have you seen this document before?

**A.** No.

**Q.** Did you ever use this in any presentations that you conducted at Buchanan?

**A.** I don't recall ever seeing it or using it.

**Q.** Do you know who prepared this?

**A.** I do not.

**Q.** Do you know where it might have been presented?

**A.** No.

**Q.** Do you know when it might have been presented?

**A.** No.

**Q.** Do you know to whom it might have been presented?

**A.** No.

**Q.** Do you know where these figures came from that are contained in the presentation?

**A.** No.

**Q.** Do you know if they are accurate?

**A.** No. No.

**MR. TORRES:** Your Honor, there has been no foundation laid for the admission of this document.



FOX - CROSS

1 THE COURT: Anything further on that?

2 MR. PETSONK: No.

3 THE COURT: I take it there is an objection to the  
4 admissibility of the document?

5 MR. TORRES: Yes, Your Honor.

6 THE COURT: The objection is sustained.

7 BY MR. PETSONK:

8 **Q.** Mr. Fox, Mr. Hymes testified in this case that in 25 to  
9 50 different orientations that he observed you to conduct  
10 for miners at the Buchanan operation, that you never brought  
11 up that CONSOL had the right to terminate retiree welfare  
12 benefits. Do you disagree with Mr. Hymes' testimony?

13 **A.** I disagree with it.

14 **Q.** Mr. Waters, who testified in this case, testified that  
15 he used a script, and, in fact, he testified he used a  
16 script that you were questioned about earlier, Plaintiff's  
17 Exhibit 10-A, and Mr. Hymes similarly testified that he --

18 MR. TORRES: I'm going to object to the form of  
19 the question, Your Honor, because it misstates Mr. Waters'  
20 testimony. So I at least need to preserve my record.  
21 That's not what he testified to. He said the document  
22 looked familiar. He never testified he used it.

23 MR. PETSONK: Okay, Your Honor. I can restate my  
24 question, Your Honor.

25 THE COURT: Go ahead.

FOX - CROSS

1 BY MR. PETSONK:

2 Q. Mr. Waters testified that he used language contained in  
3 the Plaintiff's Exhibit 10-A.

4 MR. TORRES: Objection, Your Honor.

5 MR. PETSONK: When he did -- he said that he used  
6 that lawyer talk language in his testimony here today.

7 MR. TORRES: Your Honor, that is an absolute gross  
8 mischaracterization of Mr. Waters' testimony.

9 Mr. Pomponio showed him Exhibit 10-A, and he testified  
10 that the language looked familiar. That was the sum total  
11 of Mr. Waters' testimony.

12 And Mr. Petsonk keeps trying to mischaracterize it in  
13 asking this witness a question. And I don't think that's an  
14 appropriate way to conduct an examination.

15 THE COURT: Restate your question.

16 BY MR. PETSONK:

17 Q. Mr. Waters testified that he informed miners at the  
18 Buchanan Mine that they would have lifetime retiree medical  
19 benefits subject to a reservation of --

20 THE COURT: Just one moment. Is that what Mr.  
21 Waters testified to?

22 MR. POMPONIO: Yes, Your Honor.

23 THE COURT: So, Mr. Torres, is that your  
24 recollection?

25 MR. TORRES: It is not my recollection, Your

FOX - CROSS

1 Honor.

2 THE COURT: What do you recall him saying?

3 MR. TORRES: I recall him discussing the lifetime  
4 benefits. I could have Ms. O'Connor refer to it. She was  
5 the one questioning Mr. Waters, if you want to --

6 MS. O'CONNOR: Mr. Waters said that at the time he  
7 was working there, he said he told employees that subject to  
8 the reservation of rights clause at the time that he was  
9 working there, they would have retiree medical benefits for  
10 the duration of their life, unless it changed.

11 MR. POMPONIO: His testimony, Judge, was that they  
12 would have -- if -- the rules provided that they would have  
13 retirement medical for life subject to change. I had him  
14 repeat it under cross.

15 THE COURT: Then you may present the question  
16 within that framework.

17 BY MR. PETSONK:

18 Q. Mr. Waters testified here, as we've discussed just now,  
19 that when he provided new miner orientation and training to  
20 the employees at the Buchanan Mine, that he explained to  
21 them they would have retiree welfare benefits throughout the  
22 duration of their lives, but that that benefit was subject  
23 to a reservation of rights of CONSOL's right to change the  
24 benefit.

25 MR. TORRES: Objection, Your Honor. He's -- Mr.

FOX - CROSS

1 Pomponio just said something, and he's throwing words in  
2 there to try to change the meaning of what his co-counsel  
3 just described Mr. Waters testified to. He said, benefits  
4 for life, subject to change.

5 THE COURT: And that's the sum total?

6 MR. TORRES: That's right.

7 THE COURT: So present your question then in that  
8 fashion. You have not done that. Proceed in that fashion  
9 or surrender the witness.

10 BY MR. PETSONK:

11 **Q.** Mr. Fox, Mr. Waters testified here that he told miners  
12 at the Buchanan Mine that they would receive benefits for  
13 lifetime subject to CONSOL's reservation of rights to alter  
14 those benefits. That's my understanding of his testimony in  
15 this case.

16 My question to you, sir, is, whether you dispute that  
17 testimony that Mr. Waters, in fact, said --

18 MR. TORRES: Well, object to the form of the  
19 question. How can you dispute some testimony he wasn't  
20 present to witness, Your Honor?

21 THE COURT: Sustained. You can try it again.

22 BY MR. PETSONK:

23 **Q.** Do you disagree, Mr. Fox, that Mr. Waters told miners  
24 at the Buchanan Mine in his miner -- new miner orientation  
25 sessions, that they would have benefits for the rest of

FOX - CROSS

1 their lives subject to CONSOL's reservation of rights to  
2 change those benefits?

3 MR. TORRES: Objection. Lack of foundation. He  
4 hasn't established he was present when Mr. Waters conducted  
5 any orientations.

6 THE COURT: What foundation is there for the  
7 question?

8 BY MR. PETSONK:

9 Q. Mr. Fox, were you present during new miner orientation  
10 sessions provided for Buchanan Mine by Mr. Waters?

11 A. No.

12 Q. Did Mr. Waters work for you during the time that he  
13 worked at the Buchanan Mine?

14 A. No.

15 Q. And do you know Mr. Waters?

16 A. I know him.

17 Q. How do you know him?

18 A. He worked at Buchanan after I left.

19 Q. Okay. Was there any -- well, okay.

20 I would just -- I don't think I have any further  
21 questions for the witness at this time, Your Honor.

22 MR. TORRES: I don't have any further questions,  
23 Your Honor.

24 Thank you, Mr. Fox.

25 THE COURT: May Mr. Fox be excused from the trial?

FOX - CROSS

1 MR. TORRES: Yes, Your Honor.

2 MR. PETSONK: Yes, Your Honor.

3 THE COURT: Mr. Fox, you're excused from the  
4 trial, and I caution you, however, not to discuss your  
5 testimony with any other witness in this case until the  
6 trial is over.

7 THE WITNESS: Okay.

8 THE COURT: And thank you, sir.

9 And when you exit, if you'll go through the courtroom  
10 door down that corridor. You may have come in that way.

11 THE WITNESS: Thank you.

12 THE COURT: Very good. And just leave any  
13 exhibits there at the desk. Thank you.

14 THE WITNESS: Thank you.

15 MR. TORRES: Your Honor, could we have a moment?  
16 I believe right now we have some videos to prepare, so if we  
17 could have a few minutes to get that set up so we can  
18 present those?

19 THE COURT: At this point now, what do you have  
20 left besides Mr. Kowzan tomorrow and perhaps a video  
21 deposition that you're still in the process of taking?

22 MR. TORRES: Yes. Today, we have three video  
23 depositions to present today, Your Honor: Craig Campbell,  
24 Chase Elswick and Tom Hudson.

25 And then we are trying to make arrangements to do Mr.

FOX - CROSS

1 Mason's deposition this afternoon. But we'll have that  
2 ready -- whenever that happens today, we'll have it ready  
3 for tomorrow.

4 And then we have Mr. Kowzan, and that's it.

5 THE COURT: On the three that you have left, would  
6 you tell me again how long they are? That is, the three to  
7 do today?

8 MR. TORRES: Yes, Your Honor. I believe each of  
9 them are about 25 to 30 minutes long.

10 THE COURT: Well, it seems to me, it's 25 to 1:00,  
11 it might be better for us to come back at quarter till 2:00  
12 and start with those videos at that point.

13 MR. TORRES: Yes, Your Honor.

14 THE COURT: And in light of that, it looks to me  
15 you might be able to arrange a time that you can get back to  
16 the videotaped deposition later today and get that out of  
17 the way so everything is on time in the morning.

18 MR. TORRES: Yes, Your Honor.

19 THE COURT: I've got an afternoon docket tomorrow  
20 that I'd like to make if we can get this done.

21 MR. TORRES: Yes, Your Honor.

22 THE COURT: And we'll see how it works. Thank  
23 you.

24 THE CLERK: All rise.

25 (A recess was taken at 12:35 p.m. until 2:00 p.m.)

FITZWATER v CONSOL

1                   **(Afternoon Session, February 17, 2021 at 2:00 p.m.)**

2                   THE CLERK: All rise.

3                   THE COURT: Good afternoon. Please be seated.

4                   You may proceed.

5                   MS. FUNDERBURG: Your Honor, we are prepared to  
6                   proceed with the first of our evidentiary depositions.

7                   THE COURT: And those are videotaped depositions?

8                   MS. FUNDERBURG: Yes, that's right.

9                   THE COURT: Please go ahead and set them up.

10                  MS. FUNDERBURG: Tom Hudson.

11                  (The videotaped deposition of Tom Hudson was played.)

12                  (The videotaped deposition of Tom Hudson concluded.)

13                  MS. FUNDERBURG: Your Honor, at this time, we  
14                  would move for admission of the transcript of Mr. Hudson's  
15                  deposition, and we also have that on a disc for the Court.

16                  THE COURT: Any objection?

17                  MR. POMPONIO: No, Your Honor.

18                  THE COURT: It is received and admitted.

19                  Are you going to have a written transcript?

20                  MS. FUNDERBURG: Yes, Your Honor. We have that  
21                  here.

22                  THE COURT: The next time when we go through the  
23                  next witness, let me have the transcript before you get  
24                  started.

25                  MS. FUNDERBURG: Of course. I think the next



FITZWATER v CONSOL

1 witness is going to be Mr. Elswick.

2 Can you mark this 33-A and this 33-B?

3 THE CLERK: Sure.

4 THE COURT: The Hudson transcript is being marked  
5 as an exhibit?

6 MS. FUNDERBURG: Yes, Your Honor. The written  
7 transcript is being marked Defendant's Exhibit 33-A, and the  
8 disc will be 33-B.

9 THE COURT: There is no 33?

10 MS. FUNDERBURG: That's correct.

11 THE COURT: Thank you.

12 MS. FUNDERBURG: Your Honor, before I proceed with  
13 Mr. Elswick, I can go ahead and offer the Court the written  
14 transcript and the CD premarked.

15 THE COURT: Please do so.

16 MS. FUNDERBURG: And the transcript will be  
17 Defendant's Exhibit 34-A, and the disc will be 34-B.

18 THE CLERK: This is defendant's 34-A?

19 MS. FUNDERBURG: Yes.

20 We're ready. And this will be the video of Mr.  
21 Elswick's deposition.

22 (The videotaped deposition of Chase Elswick was  
23 played.)

24 (The videotaped deposition of Chase Elswick concluded.)

25 MS. FUNDERBURG: At this time, Your Honor, the

FITZWATER v CONSOL

1 defendants move for admission of Defendant's Exhibit 34-A  
2 and 34-B.

3 THE COURT: Any objection?

4 MR. POMPONIO: No, Your Honor.

5 THE COURT: It is admitted. And they are  
6 admitted.

7 **Defendant's Exhibits 34-A and 34-B admitted.**

8 MS. FUNDERBURG: Thank you.

9 THE COURT: And just to be utterly clear, with  
10 respect to 33-A and 33-B, is there any objection to either  
11 of them?

12 MR. POMPONIO: No, Your Honor.

13 THE COURT: And they are admitted as indicated  
14 earlier.

15 **Defendant's Exhibits 33-A and 33-B admitted.**

16 THE COURT: Yes, ma'am.

17 MS. FUNDERBURG: Finally, Your Honor, we have one  
18 more deposition that we'll be offering today, and that's Mr.  
19 Craig Campbell. So --

20 THE COURT: This last one didn't meet the promise  
21 of 25 minutes. And how long is this one going to be?

22 MS. FUNDERBURG: Let me check.

23 I believe it's about a half hour, Your Honor.

24 THE COURT: Let's recess for about 10 minutes.

25 MS. FUNDERBURG: Thank you.

FITZWATER v CONSOL

1 THE CLERK: All rise.

2 (A recess was taken at 3:24 p.m. until 3:36 p.m.)

3 THE CLERK: All rise.

4 THE COURT: Please be seated. I hope you are  
5 going to do better with this one than you did the last one.

6 MS. FUNDERBURG: Your Honor, I believe it's 36  
7 minutes long.

8 THE COURT: Well, I was thinking more in terms of  
9 that may be the duller deposition I've ever heard. He's  
10 seen too many movies.

11 And you may proceed.

12 MS. FUNDERBURG: All right, Your Honor. We have  
13 one more deposition, Mr. Campbell. So I have this marked as  
14 Defendant's Exhibit 35-A for the transcript, and 35-B for  
15 the disc.

16 THE CLERK: 35-A.

17 THE COURT: You may proceed.

18 (The videotaped deposition of Craig Campbell was  
19 played.)

20 (The videotaped deposition of Craig Campbell  
21 concluded.)

22 MS. FUNDERBURG: Your Honor, at this time, the  
23 defendants move for admission of Exhibits 35-A and 35-B.

24 MR. POMPONIO: No objection.

25 THE COURT: They are admitted.

FITZWATER v CONSOL

1           **Defendant's Exhibits 35-A and 35-B admitted.**

2           THE COURT: And that covers the day's activities.

3           MR. TORRES: Yes, Your Honor.

4           THE COURT: Anything yet this evening?

5           MR. POMPONIO: Nothing from us. I just have a  
6 housekeeping question about the Defendant's Exhibits.

7           I have -- I don't have marked that Defendant's Exhibit  
8 2, 4, or 32 have been admitted. Have those -- have I  
9 just --

10          THE COURT: Do I understand, you just need copies?

11          MR. POMPONIO: I just need to know if they'll been  
12 admitted for the record?

13          THE COURT: What are the numbers again?

14          MR. POMPONIO: 2, 4, and 32.

15          THE CLERK: I have 32 is admitted. And 2 and 4 is  
16 not.

17          THE COURT: I understand from the clerk that 32  
18 has been admitted, but 2 and 4 have not.

19          MR. POMPONIO: Okay. Thank you.

20          THE COURT: And let me ask whether or not there is  
21 a motion?

22          MR. TORRES: 2 and 4, Your Honor?

23          THE COURT: Yes.

24          MR. TORRES: I believe so, but could we take it up  
25 in the morning just so we could review it. I don't believe

FITZWATER v CONSOL

1 we'll be offering it, but I just want to take a look at  
2 those.

3 THE COURT: Very good. So let us know about that  
4 first thing in the morning.

5 MR. TORRES: Yes, Your Honor.

6 THE COURT: Anything else?

7 MR. TORRES: Nothing from the defendant, Your  
8 Honor. Thank you.

9 MR. POMPONIO: Nothing from plaintiff.

10 THE COURT: If not, do I understand Mr. Kowzan is  
11 available at the outset?

12 MR. TORRES: Yes, Your Honor. I've confirmed he's  
13 arrived this afternoon.

14 THE COURT: He's in town?

15 MR. TORRES: Yes.

16 THE COURT: And the videotaped -- or -- is it  
17 another videotaped deposition that you are in the midst of  
18 now?

19 MR. TORRES: Yes, Your Honor.

20 THE COURT: And you'll be able to get the  
21 transcript for it before coming in in the morning?

22 MR. TORRES: Yes, Your Honor.

23 THE COURT: Thank you. See you at 9:30.

24 THE CLERK: All rise.

25 (Proceedings concluded at 4:18 p.m.)

## 1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine Schutte-Stant, Federal Official Realtime  
3 Court Reporter, in and for the United States District Court  
4 for the Southern District of West Virginia, do hereby  
5 certify that, pursuant to Section 753, Title 28, United  
6 States Code, the foregoing is a true and correct transcript  
7 of the stenographically reported proceedings held in the  
8 above-entitled matter and that the transcript page format is  
9 in conformance with the regulations of the Judicial  
10 Conference of the United States.

11  
12 s/Catherine Schutte-Stant, RDR, CRR

13 \_\_\_\_\_ March 8, 2021

14 Catherine Schutte-Stant, RDR, CRR  
15 Federal Official Court Reporter  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25